SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 56

INTERSTATE CIRCUIT, INC., APPELLANT,

vs.

CITY OF DALLAS.

No. 64

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

CITY OF DALLAS.

APPEALS FROM THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

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[fol. 3]

IN THE 44th JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

CITY OF DALLAS, Plaintiff,

v.

INTERSTATE CIRCUIT, INC., Defendant.

PLAINTIFF'S ORIGINAL PETITION—Filed February 14, 1966

To the Honorable Judge of Said Court:

Comes Now the City of Dallas, a municipal corporation, incorporated under the laws of the State of Texas, complaining of Interstate Circuit, Inc., a Delaware corporation, Defendant, and for cause of action would respectfully show the Court:

I.

The City of Dallas, a municipal corporation, organized under and by virtue of the laws of the State of Texas, is located in Dallas County, Texas, and the Defendant, Interstate Circuit, Inc. is a Delaware corporation with a permit to do business in the State of Texas, with Raymond Willie, Vice-President and General Manager, Majestic Building, Dallas, Texas, being the agent of said corporation upon whom service of process may be had.

II.

On November 22, 1965, the City Council of the City of Dallas enacted Ordinance No. 11284, known as the City of Dallas Motion Picture Classification Ordinance; Providing for the establishment of a Motion Picture Classification Board, outlining classification procedures, defining offenses related to the exhibition of films "not suitable for young

persons"; Providing for the issuance, revocation and suspension of licenses; Providing for judicial review and providing for injunctive relief and defining the term "not suitable for young persons", a copy of said ordinance being attached hereto and being made a part hereof as Exhibit "A" as though fully written herein word for word.

III.

Plaintiff would further show the Court in this connection that pursuant to said ordinance, the City Council of the City of Dallas appointed a chairman and eight (8) members of the Motion Picture Classification Board, and pur- [fol. 4] suant to Ordinance No. 11284, and that Ordinance No. 11298 was enacted by the City Council of the City of Dallas on December 6, 1965, which amended Ordinance No. 11284, and pursuant thereto the City Council appointed three (3) alternate members of said Board. A copy of said Ordinance being attached hereto as Exhibit "B" as though fully written herein word for word.

Plaintiff would further show the Court that the above film was classified based upon the standard contained in Subsection (f) of Section 46A-1 of said Ordinance, which read as follows:

"(f) 'Not suitable for young persons' means:

"(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest."

IV.

Plaintiff would further show the Court that pursuant to Ordinance No. 11284 which requires such action on behalf of such Motion Picture exhibitor, the Defendant, Interstate Circuit, Inc. submitted the film "Viva Maria" to the

Motion Picture Classification Board by letter dated January 24, 1966, and the Defendant notified said Classification Board that it proposed to classify the film "Viva Maria" to be exhibited at the Esquire Theatre, Dallas, Texas, as "suitable for young persons", and that the Classification Board met on January 25, 1966, and requested a screening of said movie as provided in Ordinance No. 11284, and that said picture was made available to the Motion Picture Classification Board on Monday, February 7, 1966, and that after viewing said film, the Board classified it as being "not suitable for young persons" based upon the standard contained in Subparagraph 2 of Paragraph 4 of Section 46A-1 of Ordinance No. 11284 by portraying sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests.

That the Board filed such classification with the City Secretary of the City of Dallas as provided in said Ordinance, and the City Secretary, as Secretary of the Motion Picture Classification Board, notified the Defendant Interstate Circuit, Inc. by letter dated February 9, 1966, and that by letter dated February 11, 1966, Defendant notified the Classification Board of the non-acceptance of such classification, and that it intended to exhibit the film "Viva Maria" at the Esquire Theatre under the classification of "suitable for young persons".

[fol. 5] V.

The Plaintiff would further show the Court that on Sunday, February 13, 1966, the Defendant inserted an advertisement in the Dallas Morning News, Dallas, Texas, stating that the film involved herein would be shown at the above named theatre without carrying the notation as required by Ordinance No. 11284, "not suitable for young persons", and that on said date, to-wit: February 17, 1966, the film involved is scheduled to be exhibited at the Esquire

Theatre, Dallas, Texas, without carrying the notation "Not suitable for young persons", as provided by Ordinance No. 11284 as was classified by the Dallas Motion Picture Classification Board.

VI.

Plaintiff would further show the Court that the film "Viva Maria" will be exhibited by Defendant Interstate Circuit, Inc. at the Esquire Theatre in Dallas, Texas, in violation of Ordinance No. 11284 of the City of Dallas as amended unless Defendant is enjoined, and said Defendant will exhibit said film to the general public, including young persons under the age of sixteen (16) years, in violation of Ordinance No. 11284, without advertising said film as being "not suitable for young persons", and that this matter should be set for hearing before the Court on Plaintiff's application for a temporary and permanent injunction, as provided in Ordinance No. 11284.

Wherefore, Premises Considered, Plaintiff prays that Defendant be cited to appear and answer herein, and that this cause be set for a hearing within five (5) days on its application for a temporary injunction, and that if Defendant will agree, that this cause be heard on its application for a permanent injunction, and that upon a final hearing, said Defendant be enjoined from violating Ordinance No. 11284 as set out above; and that all costs be adjudged against Defendant herein, and for such other and further relief to which Plaintiff may be entitled.

Respectfully submitted,

N. Alex Bickley, Ted P. MacMaster, Pat Stacy, Jerry Williamson, Attorneys for Plaintiff, City of Dallas, 501 City Hall, Dallas, Texas.

[fol. 6] *Duly sworn to by Pat Stacy, jurat omitted in printing.*

[fol. 7]

FIAT

66-1280-B

On this the 14 day of February, 1966, came on for consideration the sworn Petition of Plaintiff, City of Dallas, wherein the City of Dallas is seeking a temporary and permanent injunction against Interstate Circuit, Inc., and Plaintiff requests that the cause be set for hearing,

It Is Therefore Ordered, Adjudged and Decreed by the Court that the Plaintiff's application for a temporary and permanent injunction be set for a hearing on the 17 day of February, 1966, at 9 o'clock a.m., and it appearing to the Court that the firm of Tobolowsky, Hartt, Schlinger & Blalock, Attorneys for Defendant, have agreed to waive service of process and to accept service of process; there shall be no service of process issued by the District Clerk.

Julian C. Hyer, Judge Presiding.

Note: Original Exhibits "A" and "B" are being sent to the Court of Civil Appeals in their original form.

[File endorsement omitted]

[fol. 8]

IN THE 44TH JUDICIAL DISTRICT COURT
IN AND FOR DALLAS COUNTY, TEXAS
No. 66-1280-B

CITY OF DALLAS,

vs.

INTERSTATE CIRCUIT, INC.

ANSWER IN INTERVENTION OF UNITED ARTISTS CORPORATION—Filed February 16, 1966

To the Honorable Julian C. Hyer, Judge of Said Court:

Now comes United Artists Corporation and files this its Answer in Intervention to the Plaintiff's Original Petition in the above styled and numbered cause of action and respectfully shows to the Court, the following:

I.

United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware with a Certificate of Authority to transact business within the State of Texas. During the period from November 22, 1965, to date, and prior thereto, United Artists Corporation has been a distributor of motion picture films and has been engaged in the business of licensing the right to exhibit motion picture films distributed by it. United Artists Corporation, as Intervenor, has an interest in the matter in controversy herein in that it is the distributor, and exclusive owner of the domestic distribution rights, of the motion picture film "Viva Maria" and has licensed said film

[File endorsement omitted]

for exhibition at the Esquire Theater in Dallas, Texas, to Interstate Circuit, Inc. such exhibition to commence on February 17, 1966. Plaintiff City of Dallas seeks an injunction herein, which if granted would interfere with the heretofore existing contractual rights and obligations of Intervenor and Defendant Interstate Circuit, Inc. and would deny Intervenor its constitutionally guaranteed rights of free speech and expression, equal protection of the law and due process of law.

[fol. 9]

II.

Attached hereto as Exhibit A and made a part hereof for all purposes as fully as though set forth in the body hereof is a true and correct copy of the License Agreement heretofore executed by Interstate Circuit, Inc. and Intervenor with respect to the aforementioned exhibition of "Viva Maria".

III.

Ordinance No. 11284, the City of Dallas Motion Picture Classification Ordinance, was adopted by the City Council of the City of Dallas on November 22, 1965; it controvenes the rights of Intervenor, as the distributor of said motion picture film "Viva Maria", guaranteed to it by the United States Constitution and by the Texas Constitution in each and every of the following particulars:

A. The said Ordinance violates the First Amendment to the United States Constitution, which is applicable to the City of Dallas under the due process of law clause of the Fourteenth Amendment of said Constitution, in that the said Ordinance unlawfully inhibits and restrains protected areas of freedom of speech.

B. The said Ordinance violates the due process of law clause of the Fourteenth Amendment to the United States Constitution in that it fails to provide adequate

standards to govern the actions of the Motion Picture Classification Board; and in that the standards contained in said Ordinance are so vague that Intervenor cannot be and is not adequately apprised of the films which may be subject to classification thereunder.

C. The said Ordinance violates the due process of law clause of the Fourteenth Amendment to the United States Constitution and the First Amendment to said Constitution in that it places a total restraint on the exhibition of "films", as defined in the Ordinance, in events not constitutionally permitted, including for example any of specified minor infractions of the Ordinance.

D. The said Ordinance violates the First Amendment and the Fourteenth Amendment to the United [fol. 10] States Constitution in that it does not place the burden on the City of Dallas to prove that a film classified as "not suitable for young persons" is an unprotected expression of free speech under said constitutional provisions.

E. The said Ordinance violates the First Amendment and the Fourteenth Amendment to the United States Constitution in that the action of the Motion Picture Classification Board constitutes a restraint on free speech prior to any judicial determination that the matter contained in such film is an unprotected expression of free speech.

F. The said Ordinance violates the First Amendment and the Fourteenth Amendment to the United States Constitution in that it does not assure a prompt and final judicial decision as to whether or not the matter contained in a film classified as "not suitable for young persons" is within or without protected areas of free speech.

G. The said Ordinance violates the equal protection clause of the Fourteenth Amendment of the United

States Constitution in that it unlawfully and unreasonably discriminates against this Intervenor and its rights in the film "Viva Maria", because the Ordinance excludes from its coverage all and each of the following: (i) all plays, operettas, operas, musical and dramatic productions and other forms of live stage entertainment; (ii) films shown on local television stations; (iii) all news reels; (iv) all persons who show "films," as defined in that Ordinance, without charging for admission to the exhibition of the same; and (v) the exhibition of comparable films to the same or similar audiences.

H. The said Ordinance violates the freedom of speech provisions in Article I, Section 8 of the Texas Constitution, in that it unlawfully places a prior re- [fol. 11] straint on the exhibition of all movies in the City of Dallas.

I. The said Ordinance violates the freedom of speech provisions in Article I, Section 8, of the Texas Constitution in that the said Ordinance unlawfully inhibits and restrains protected areas of freedom of speech.

J. The said Ordinance violates the "due course of law" provisions in Article I, Section 19, of the Texas Constitution in that it fails to provide adequate standards to govern the actions of the Motion Picture Classification Board; and in that the standards contained in said Ordinance are so vague that Intervenor cannot be and is not adequately apprised of the films which may be subject to classification thereunder.

K. The Ordinance violates the "due course of law" provisions in Article I, Section 19, of the Texas Constitution in that it places a total restraint on the exhibition of "films", as defined in the Ordinance, in events not constitutionally permitted, including for example any of specified minor infractions of the Ordinance.

L. The said Ordinance violates Article I, Section 19, of the Texas Constitution in that it does not place the burden on the City of Dallas to prove that a film classified as "not suitable for young persons" is an unprotected expression of free speech under said constitutional provisions.

M. The said Ordinance violates Article I, Section 19, of the Texas Constitution in that the action of the Motion Picture Classification Board constitutes a restraint on free speech prior to any judicial determination that the matter contained in such film is an unprotected expression of free speech..

[fol. 12] N. The said Ordinance violates Article I, Section 19, of the Texas Constitution in that it does not assure a prompt and final judicial decision as to whether or not the matter contained in a film classified as "not suitable for young persons" is within or without protected areas of free speech.

O. The said Ordinance violates the equal rights provision contained in Article I, Section 3, of the Texas Constitution, in that it unlawfully and unreasonably discriminates against this Intervenor and its rights in the film "Viva Maria", because the Ordinance excludes from its coverage all and each of the following: (i) all plays, operettas, operas, musical and dramatic productions and other forms of live stage entertainment; (ii) films shown on local television stations; (iii) all news reels; (iv) all persons who show "films," as defined in that Ordinance, without charging for admission to the exhibition of the same; and (v) the exhibition of comparable films to the same or similar audiences.

P. The said Ordinance violates the freedom of speech provisions in Article I, Section 8, of the Texas Constitution in that the test provided in that Ordinance

for declaring a film "not suitable for young persons" is not that which is required under the Texas or the United States Constitutions by the United States Supreme Court, which rules that for a film to be excluded from protected areas of free speech, the test must be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests."

[fol. 13] Q. Under the requisites of due process of law, and of equal protection of law, and of assured protection of free speech, in accordance with all and each of the provisions of (i) the First Amendment to the Constitution of the United States (ii) the Fourteenth Amendment thereto (iii) Article I, Section 8 of the Texas Constitution and (iv) Article I, Sections 3 and 19 of the Texas Constitution, the injunction sought by the City of Dallas must be denied because the ordinance under which it seeks the injunction prescribes unconstitutional standards to serve as bases for classifications to be made and provides for processes that are unfair and unconstitutional, all as to be followed by the Motion Picture Classification Board, in each of the following respects:

1. Subsection (f) of Section 46A-1 of said Ordinance details no less than 46 respects, any one of which may be determined by the Board in its discretion as a single basis for a classification proscribing exhibition of a film as films generally are exhibited; and the Ordinance provides for a classification of every film, the exhibition of which is determined to be thus proscribed, under a single all embracing generality—"not suitable for young persons".

2. Each of the 46 bases of proscription are vague, indefinite and uncertain, in that as to each the standard of the Ordinance is expressly that "in the judg-

ment of the Board, there is a substantial probability that it will create the impression on young persons. . . .", the vague, indefinite and uncertain qualities being specifically involved as to each of the 46, in that (i) "an impression" will be "created" on "young [fol. 14] persons" only; that (ii) the Board is not directed to find any such impression, but only that there is a "substantial probability" thereof; and that (iii) the Board is not directed even to find such a substantial probability as a fact but merely that in the opinion or judgment of the Board that there may be such a substantial probability of such an impression.

3. Moreover, in groups of six terms, standards are presented to the Board as bases for proscribing a film, these six standards each being in the alternative to the other five, namely that the conduct about which the "impression on young people" may be a "substantial probability" in the "judgment of the Board", may be (i) "profitable", or (ii) "desirable", or (iii) "acceptable", or (iv) "respectable", or (v) "praiseworthy", or (vi) "commonly accepted"; with the standards of the Ordinance specifying that any one of the six suffices; and with the meaning of each of the six being in such a context vague, indefinite and uncertain.

4. For one example, pursuing the words of the Ordinance quoted in Plaintiff's Petition, Section 46A-1 (f)(2) covers no less than 24 alternative determinations of the Board one or another of which may have been made with reference to the film "Viva Maria" and one of those 24 may be that it "portrayed nudity beyond the customary limits of candor in the community . . . in such a manner as . . . in the judgment of the Board, there is a substantial probability that it will create the impression on young persons

[fol. 15] that such conduct is . . . acceptable." That determination is too vague, uncertain and indefinite to serve as a basis for proscription of any film or as a basis for any criminal or forfeiture proceeding.

5. If that be the charge against "Viva Maria", then the injunction herein sought cannot be granted.

6. If that not be the charge against "Viva Maria" in this action but some other of the 24 alternatives within the language of Section 46A-1 (f)(2), then the uncertainty of which of the 24 items is charged, makes it improper under the Ordinance that any injunction be issued herein.

7. The Ordinance in specifying its standards omits each and any of the following standards or the equivalent of any of them and in effect directs the judgment of the Board for which it provides to be without taking consideration of any of the following:

(i) The artistic beauty of the film as a whole;

(ii) The quality of humor or any farcical aspects of the film;

(iii) The literary quality of the film;

(iv) The social message of the film;

(v) Any other redeeming feature of the film.

And unconstitutionally provides for censorship of a film without essential emphasis on these bases or any of them for preserving the vested right of expression that a national distributor of a film has.

[fol. 16] 8. The Ordinance as construed by Plaintiff in its Petition places the standard wholly on the judgment of the Board and not on the judgment of the Court.

9. The Ordinance as construed by Plaintiff in its Petition places on Plaintiff the burden only of show-

ing what the action of the Board has been and not that the film "Viva Maria" is in fact beyond the constitutional limits of protection to free speech.

10. The Ordinance in its application to Intervenor, the interested motion picture distributor, provides that an automatic proscription of the film "Viva Maria" follows, once the Board has classified that film as "not suitable for young persons", unless Interstate Circuit, Inc., a motion picture exhibitor, takes the affirmative action specified in the Ordinance to prevent that automatic result; no notice to any distributor is provided for and this Intervenor had no such notice and had no recourse under the Ordinance to prevent the proscription (if the exhibitor failed to take the specified affirmative action) except to assume the burden of seeking an injunction to prevent the City from enforcing the proscription decided upon by its Board; the constitutional protection of free speech to which this Intervenor has a right may not constitutionally be thus divested by action of a board, an administrative body or a municipality.

11. The Ordinance in its application to Intervenor and its rights in "Viva Maria", is lacking in due process and is unfair in that it contemplates a temporary injunction pending a hearing whether a permanent injunction shall issue, and without any de- [fol. 17] termination by a court or by a jury on the merits as to whether the film is or is not within the protection accorded under the Constitution to free speech.

12. The Ordinance as construed by the Plaintiff is lacking in due process and is unfair in its application to Intervenor and its rights in "Viva Maria" in that a consolidated hearing on a temporary and a permanent injunction is contemplated, if the Plaintiff and exhibitor shall so agree and if they agree, with

or without a jury, without Intervenor being granted any notice or any opportunity to be heard at any stage of the proceedings before the Board or before the Court.

IV.

For further answer, if the same be necessary, to Plaintiff's Original Petition, Intervenor relies upon and asserts its legal right of requiring the Plaintiff to prove by a preponderance of the evidence all material allegations asserted by it. Intervenor would further show that no adequate petition has been filed with the City, complying either with the requisites of said Ordinance or with the Rules of Civil Procedure of the State of Texas, authorizing the entry of any injunction with respect to the exhibition of "Viva Maria", either temporary or permanent.

Wherefore, premises considered, Intervenor United Artists Corporation prays that Plaintiff's application for a temporary injunction and its application for a permanent [fol. 18] injunction be in each and every respect denied and that Plaintiff's Original Petition be dismissed.

Paul Carrington, Dan McElroy, Robert H. Mow, Jr., Attorneys for Intervenor United Artists Corporation, 1700 Mercantile Bank Building, Dallas, Texas.

Of Counsel: Carrington, Johnson & Stephens, 1700 Mercantile Bank Building, Dallas, Texas.

Certificate of Service Pursuant to Rule 72 (omitted in printing).

Note: Exhibit "A" attached to this Instrument is being sent to the Court of Civil Appeals in its original form.

[fol. 19]

IN THE 44TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS
No. 66-1280-B

CITY OF DALLAS, Plaintiff,

v.

INTERSTATE CIRCUIT, INC., Defendant.

DEFENDANT'S ORIGINAL ANSWER—
Filed February 17, 1966

To the Honorable Judge of Said Court:

Now comes Interstate Circuit, Inc., Defendant herein, and files this its original answer to the Plaintiff's Petition, and for such answer would respectfully show unto the Court the following:

I.

This Defendant authorized its attorneys to receive pleadings in this cause without having a citation or a notice to show cause issued. Pursuant to this agreement a copy of Plaintiff's Original Petition was delivered to said attorneys on Monday, February 14, 1966. At this time Defendant is filing its answer for the purpose of having written pleadings before the Court at the time of the temporary injunction hearing set in this cause for 9:00 o'clock A.M. on Thursday, February 17, 1966. The Defendant reserves to itself the right to amend its pleadings and to file such amended answer of the appearance day which would nor-

[File endorsement omitted]

mally be accorded to it on Monday after twenty (20) days following the service of the papers on February 14, 1966.

II.

The Defendant excepts to Plaintiff's Petition in its entirety for the following reasons:

(1) Nowhere in the petition does the Plaintiff allege that it does not have an adequate remedy at law.

[fol. 20] (2) The Petition does not allege that the advertising in the Dallas Morning News on Sunday, February 13, 1966, was in fact illegal. In this connection, the Defendant applied for a classification of the commercial motion picture "Viva Maria", as suitable for young persons, according to the terms of its letter of January 24, 1966, addressed to the Dallas Motion Picture Classification Board. According to the pleadings of the Plaintiff, this Board by instrument and by letter dated February 9, 1966, notified the Defendant that the requested classification was not approved and that the Board had classified the picture as "not suitable for young persons". Ordinance No. 11284, Section 46A-3(c), provides in part:

> "If the classification of a film is changed as the result of such a hearing to the classification 'not suitable for young persons', the exhibitor showing the film shall have seven days in which to alter the advertising and audience policy to comply with such classification."

(3) The Petition does not allege that in truth and in fact, the motion picture "Viva Maria", portrays sexual promiscuity in such a manner as to incite or encourage delinquency or sexual promiscuity on the part of young persons, or to appeal to their prurient interests. This exception goes to the Petition as a whole, and particularly to the last unnumbered paragraph of Paragraph III, and to the first paragraph of Paragraph IV of Plaintiff's Petition.

(4) The petition does not allege or in any wise show that an injunction is necessary to prevent the City from suffering an irreparable loss or a substantial injury.

(5) There is no allegation that the Plaintiff has complied with the terms of its own Ordinance No. 11284, and has brought a suit within three (3) days following the delivery to the City Secretary of the Defendant-Exhibitor's [fol. 21] notice of non-acceptance of the ruling of the Classification Board regarding the picture "Viva Maria". This suit is presently cast as an injunction to prevent the Defendant from advertising that it will show this picture as "suitable for young persons". The First and Fourteenth Amendments of the Constitution of the United States as interpreted in *Freedman* v. *Maryland,* and the terms of Ordinance No. 11284, Section 7 (Judicial Review), requires that following the classification restricting the exhibition of a motion picture, as was done by the Dallas Movie Review Classification Board in this case, that the Board, so classifying or restricting, should immediately go into Court and have its determination confirmed by a Court of competent jurisdiction. Failure to allege and prove that this has been done violates both the terms of the City's ordinance and also the Constitution.

(6) There is no showing that the criminal sanctions of Ordinance No. 11284 are not an adequate remedy at law.

(7) Defendant objects and excepts to the Petition as a whole because it does not plead the decision of the Dallas Movie Review Classification Board, but instead rather pleads an interpretation thereof as is sworn to by one of the City Attorneys.

III.

Defendant excepts to the allegations of Paragraph VI, wherein it is alleged "that the matter should be set for hearing—as provided in Ordinance No. 11284", for the rea-

son that the City of Dallas does not have any authority to provide for a District Court of the State of Texas setting a hearing on temporary and permanent injunction; and

For the further reason that the Ordinance is long, consisting of approximately ten (10) pages of printed matter, and the Petition does not particularize what portion of the Ordinance, if any, under which the Plaintiff seeks to bring this action.

[fol. 22] IV.

Defendant excepts and objects to the prayer in its entirety for the reason that it does not set forth the type or kind of relief which the Plaintiff seeks to obtain herein.

A prayer seeking to enjoin the Defendant from violating an Ordinance providing criminal penalties in its own right does not, within the purview of a court of equity which would entitle the Plaintiff to the remedy of injunction.

[fol. 23] V.

The Defendant denies each and every, all and singular, the material allegations of Plaintiff's Original Petition, and demands strict proof thereof.

VI.

Answering herein affirmatively, the Defendant would show that Ordinance No. 11284 is unconstitutional and violates the rights of this Defendant under the First and Fourteenth Amendments of the Constitution of the United States, and also under the provisions of Article I, Section 8, of the Constitution of the State of Texas, for the following reasons:

(1) The Ordinance as a whole establishes a form of prior restraint and censorship of communication. The procedures established by it require that the Board classify pictures as "not suitable for young persons" and sets forth a definition of this term in Section 46A-1(f) of Ordinance No.

11284. (In order to avoid encumbering the record with duplication of pleadings, all references to the Ordinance, unless otherwise stated, will be to Ordinance No. 11284, a copy of which is found in the Plaintiff's Petition, and a copy will be introduced by this Defendant at the time of trial if the same is not done by the Plaintiff as a part of its case.)

(2) The provisions of the Ordinance purporting to define "not suitable for young persons" are vague and indefinite. This definition found in Section 46A-1(f) does not provide any objective standard for the use by members of the Board, but to the contrary, directs the Board to classify a picture as "not suitable for young persons" if, in the judgment of the Board, the picture is likely to incite crime, delinquency, or sexual promiscuity by young persons or to appeal to their prurient interests. Without legally recognized standards which can be determined and applied objectively, the classification of films under the Ordinance will violate Plaintiff's rights under the First Amendment.

[fol. 24] (3) Prompt judicial determination of any action by the Plaintiff in classifying a motion picture as "not suitable for young persons", must be assured to the Defendant. This provision for prompt judicial determination must be guaranteed by statute or by a final court decision. Neither statutes of the State of Texas, the Texas Rules of Civil Procedure, and the Rules of Practice in Civil Cases in the District Courts of Dallas County provide for prompt judicial determination. The proceedings for a temporary injunction are given certain preferences by statutes, and by Texas Rules of Civil Procedure, but do not give a determination of the Plaintiff's rights since the purpose of the temporary injunction is to preserve the status quo, and such a writ will issue for that purpose on the showing of a "probable right" and a "probable injury" without sufficient proof to establish a preponderance of the evidence. The trial for a permanent injunction is given no

preferential treatment by either rules or statutes. Neither a temporary injunction nor a permanent injunction proceeding provides a prompt judicial determination of the Plaintiff's right to restrict the exhibition of commercial motion pictures licensed for showing in the Defendant's theatres.

Section 7, entitled "Judicial Review", is a concession by the Plaintiff to waive many rights which it would have for the preparation of a case according to standards established by the Texas statutes and Rules of Civil Procedure. The agreement of Plaintiff to waive its rights as found in this section does not provide assurance of prompt judicial review by statute or by court decision. The Plaintiff does not have the power or authority to change either the Texas statutes or the Texas Rules of Civil Procedure, and the attempt by it to establish a system of censorship or classification without providing for prompt review violates the Defendant's rights under the First Amendment. Besides the absence of a statute or court decision assuring prompt judicial review of the Plaintiff's action in classifying a pic- [fol. 25] ture, the Ordinance is defective because the Plaintiff does not have the right to tell any one of the trial or appellate courts which may hear a case of this nature how to set its docket and to control the actual trial procedures. The Plaintiff's professed cooperation and willingness to assure a speedy trial insofar as its rights are concerned does not provide the essential guarantee that there will be a speedy trial.

(4) In defining "advertisement" as commercial promotional material initiated by an exhibitor, the Ordinance restricts advertising material. It is not clear, and there is no standard provided to determine whether "initiated" means the display of posters, newspaper advertisements, etc., furnished by the producer or whether it means to restrict those designed and published or exhibited by the exhibitors. A substantial part of the advertising and promotional material designed for any motion picture is pre-

pared as a part of the national advertising campaign. Whether it be for billboard and poster display or in the form of "trailers" showing a preview of coming attractions, this is material licensed to the exhibitor as a part of the rights it obtains in connection with exhibiting the motion picture. Further, the trailer of any picture may become classified as "not suitable for young persons" if it has been shown as a part of the program where a film of that type was exhibited. This interferes with the free movement of both the advertising material, and the motion pictures themselves in interstate commerce, and interferes with the right of the Defendant to present a non-obscene advertisement to the public in the advertising campaign for a picture which is to be shown.

(5) By the operation of its Ordinance, the Defendant discriminates against Defendant in favor of the television stations. Nearly all of the motion pictures which are exhibited by Defendant in its theatres are shown on television. To restrict Defendant by a burdensome classification and cen- [fol. 26] sorship ordinance while allowing all television stations to exhibit the same picture in the same area is an unequal enforcement of the law.

(6) The Plaintiff, by the Ordinance, would divert Defendant's patrons to adjacent cities, where the same motion pictures could be seen without restraint as pointed out heretofore.

(7) Obscenity is the only valid ground for restricting or prohibiting the classification of a commercial motion picture under the amendments to the United States Constitution. Ordinance No. 11284 is an attempt to classify commercial motion pictures based upon their possible effect upon young persons as a special group or class. This is contrary to the constitutional provisions mentioned above and the laws of Texas. This pronouncement regarding the constitutional provisions was made prior to the amendment of Article 527 which exempted commercial motion pictures from ob-

scenity prosecutions as mentioned in the following paragraph. The constitutional provisions alone have been construed to prohibit a classification system such as the Plaintiff seeks to enforce by Ordinance No. 11284.

VII.

The provisions of Ordinance No. 11284 violate the Texas Constitution and the state law in the following particulars:

(1) Article 527 of the Penal Code prohibits distribution of obscene material to minors. The exact language is as follows:

> "Sec. 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, *to a minor*, shall be fined not more than Two Thousand Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both". (Emphasis added.)

[fol. 27] This statute preempts the field of distribution of obscene material to minors. The Plaintiff, as a home rule city, cannot legislate in violation and contradiction of the state statute which controls this subject. Only obscene material is denied the protection of the First Amendment of the Constitution of the United States according to repeated decisions of the Supreme Court of the United States; Article I, Section 8, of the Texas Constitution, gives a similar protection and has been so construed by Texas courts; Article 527 of the Penal Code was amended in 1961 to incorporate the Supreme Court's definition of obscenity and to provide the regulation set forth in that statute.

[fol. 28] (2) Article 527 of the Penal Code of the State of Texas sets standards for the regulation of obscene material. Commercial motion picture films that have the seal of the Production Code of the Motion Picture Association of America, Inc., or which legally move in interstate commerce, or which are lawfully imported into the United States through a customs office are exempt from regulation, along with newspapers. It is the intention of this statute to protect commercial motion pictures and this industry from the harassment of ordinances such as the one involved in this case. Even as a home rule city, the Plaintiff cannot regulate motion pictures in violation or in terms different from those of Article 527 of the Penal Code.

XI.

Ordinance No. 11284 purports to classify motion pictures, and by both the preamble and the emergency clause, ties directly to a prior classification ordinance which has been held to be unconstitutional in certain particulars, and the enforcement of which was enjoined. Ordinance No. 10,963 was passed on April 5, 1965, and declared that there was a serious increase of crime, delinquency, and sexual promiscuity on the part of young persons of school age in the City of Dallas. With this preamble, the Plaintiff, in that Ordinance, restricted the exhibition of motion pictures, in exactly the same language as is found in the present ordinance to young persons under eighteen (18) years of age. There was no statistical evidence of any nature, either in the records of the Plaintiff's Police Department, nor in the records of the Juvenile Department of Dallas County, to show any "serious increase of crime, delinquency, and sexual promiscuity on the part of young persons of school age" (meaning eighteen years old in the former ordinance) in the City of Dallas when the first ordinance was passed on April 5, 1965. There are no records in the City of Dallas [fol. 29] to show that there has been any material change in crime, delinquency, and sexual promiscuity by sixteen (16) or seventeen (17) year old boys or girls in the City of Dallas

after April 5, 1965, and prior to the passage of this Ordinance on November 22, 1965. The Plaintiff is seeking to establish the system of prior restraint and censorship already discussed here for the sole purpose of mollifying the demands of certain organized groups in the City. These groups by political pressures are seeking to restrict the exhibition of commercial motion pictures which they do not like, but which are not obscene and which can legally be shown by Defendant under its rights guaranteed by the First Amendment. There is no causal connection shown between the viewing of commercial motion pictures as have been exhibited in the City of Dallas and any increase of crime, delinquency, or sexual promiscuity on the part of young persons, or anyone else. There is no clear and present danger of any nature shown that would justify the Plaintiff's interference with the Defendant's rights to free communication.

Cross-Action

XII.

The Defendant, Interstate Circuit, Inc., coming now as a Cross-Plaintiff, would show that the parties are correctly identified in that Cross-Defendant is a municipal corporation with a home rule charter, and that it, Cross-Plaintiff, is a Delaware corporation doing business in Texas, operating commercial motion picture theatres in that City and elsewhere.

Cross-Plaintiff further adopts the allegations contained in Paragraphs No. VI through XI inclusive as a part of its cross-action.

XIII.

The Cross-Defendant under the terms of its own ordinance, has not gone into a District Court of Dallas County, Texas, to secure an affirmative adjudication by injunction [fol. 30] or a declaratory judgment sustaining the action

of its Motion Picture Classification Board in classifying the motion picture "Viva Maria" as "not suitable for young persons". By Section 46A-7 of the Ordinance as properly interpreted by the Cross-Defendant, the City of Dallas had the burden of securing the judgment of the court that any motion picture classified as "not suitable for young persons", and particularly "Viva Maria", was not suitable for young persons. On February 10, 1966, Cross-Plaintiff received notification from the City Secretary that its application to show this picture was rejected by the Motion Picture Classification Board, and that the picture was, by that Board, classified as "not suitable for young persons". *On* February 11, 1966, Cross-Plaintiff delivered its notice of non-acceptance of this classification. Three days following the delivery of such notice expired on February 14, 1966. To this date, February 17, 1966, the Cross-Defendant has not undertaken the burden which it placed upon itself in compliance with *Freedman* v. *Maryland*. It has not asked this Court or any court to determine that "Viva Maria" is a motion picture not suitable for exhibition to young people. Thus, it has not gone into a court seeking a prompt judicial determination that its restriction on the exhibition of this film is valid.

XIV.

The failure to get a prompt judicial determination of the validity of its classification ordinance as applied to this picture makes the ordinance unconstitutional to the specific fact application here as well as in the general situations outlined above.

Wherefore, Premises Considered, Defendant prays that:

(1) Each of its special exceptions be sustained;

(2) That the injunction, both temporary and permanent, be denied the Plaintiff, and that the Plaintiff take nothing by its suit;

[fol. 31] (3) That Ordinance No. 11284 of the City of Dallas be declared unconstitutional in general, and in its particular application herein;

(4) Defendant, as Cross-Plaintiff, prays that Ordinance No. 11284 be declared unconstitutional and that the City of Dallas be permanently enjoined from enforcing the same and attempting to classify and censor commercial motion pictures exhibited by this Cross-Plaintiff; and

(5) Both as Defendant and Cross-Plaintiff, that it recover its costs herein expended, and for such other and further relief, both in law and in equity, that it is justly entitled to receive.

Respectfully submitted,

Tobolowsky, Hartt, Schlinger & Blalock, By Grover Hartt, Jr., By Edwin Tobolowsky, 3525 Southland Center, Dallas, Texas 75201, RI 2-9205, Attorneys for Defendant and Cross-Plaintiff.

Proof of Service (omitted in printing).

[fol. 32]

IN THE 44TH JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

No. 66-1280-B

CITY OF DALLAS, Plaintiff,

v.

INTERSTATE CIRCUIT, INC., Defendant.

TRIAL AMENDMENT—Filed February 17, 1966

To the Honorable Judge of Said Court:

Comes now the City of Dallas, Plaintiff herein, and with leave of the Court first had and obtained, files this its Trial Amendment in the above entitled and numbered cause, amending Paragraph VI and the Prayer of Plaintiff's Original Petition filed herein, and as reason therefor, would show the Court as follows:

1.

That the film "Viva Maria" scheduled by the Defendant to be exhibited at the Esquire Theatre in Dallas, Texas, beginning February 17, 1966, was classified by the City of Dallas Motion Picture Classification Board as "not suitable for young persons" on the ground that the film as a whole portrays sexual promiscuity in such a manner as to be, in the judgment of said Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests. That the scheduled exhibition of said film by Defendant at the Esquire Theatre as aforesaid, is in violation of Ordi-

[File endorsement omitted]

nance No. 11284 of the City of Dallas, as amended, in that the Defendant has failed and refused and continues to fail and refuse to advertise said film as "not suitable for young persons" although it was so classified by said Board, and unless the Defendant is restrained and enjoined from exhibiting said film without advertising it as required by said Ordinance in question, to-wit: Ordinance No. 11284, as amended, irreparable damage and injury will result to the health, safety and welfare of the City of Dallas, and particularly the young people under the age of sixteen years, [fol. 33] and the Plaintiff has no adequate remedy at law other than by injunction to prohibit the exhibition of said film in violation of said Ordinance, since the purported intention of the Defendant to exhibit said film constitutes a public nuisance in violation of Section 46A-8, Subsection (a) of said Ordinance, which declares that the act of exhibiting a film classified "not suitable for young persons", if in the current advertisement of such film, such exhibitor fails to state clearly the classification of such film, constitutes a public nuisance.

In this connection Plaintiff would further show the Court that it has complied with the requirements of said Ordinance in filing its application for a temporary injunction, in that on Friday, February 11, 1966, as heretofore stated, the Defendant notified the Classification Board that it did not intend to comply with the classification placed on said film by said Classification Board, and suit was instituted within three days after the receipt of said letter, to-wit, on February 14, 1966.

Wherefore, Premises considered, your Plaintiff prays that upon a hearing hereof, the Defendant having answered herein, that this Court issue its Writ for Temporary Injunction, enjoining the Defendant from:

(1) Exhibiting the film "Viva Maria" without advertising said film as "not suitable for young persons", the Defendant having evidenced his intention in writing not to comply with the provisions and requirements

of said Ordinance No. 11284 as amended, and the ruling of the Board; and

(2) Violating Ordinance No. 11284, as amended, by exhibiting any film contrary to the provisions of said Ordinance.

That upon a final hearing hereof that this cause be heard on Plaintiff's Application for a permanent injunction and that said Defendant be permanently enjoined from violating the provisions of Ordinance No. 11284 as amended, as set out [fol. 34] above, and that all costs be adjudged against Defendant herein, and Plaintiff prays for such other and further relief to which it may be entitled.

Respectfully submitted,

N. Alex Bickley, Ted P. MacMaster, Pat Stacy, Jerry Williamson, Attorneys for Plaintiff, City of Dallas, 501 City Hall, Dallas, Texas 75201.

Duly sworn to by Ted P. MacMaster, jurat omitted in printing.

Proof of Service (omitted in printing).

[fol. 35]

IN THE 44TH JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

No. 66-1280-B

CITY OF DALLAS,

vs.

INTERSTATE CIRCUIT, INC.

MOTION TO STRIKE ANSWER IN INTERVENTION—
Filed February 17, 1966

To the Honorable Julien C. Hyer, Judge of Said Court:

Now Comes the City of Dallas, Plaintiff in the above styled and numbered cause and files this its Motion to Strike its Answer in Intervention, filed by the United Artists Corporation to the Plaintiff's Original Petition in the above styled and numbered cause of action, and as grounds for such Motion would show the Court the following:

I.

The allegations by the Intervenor that Ordinance No. 11284, the City of Dallas Motion Picture Classification Ordinance, violates the First and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 8 of the Texas Constitution, as well as other Sections of the Texas Constitution, was adversely determined to the contentions of the Interstate Circuit, Inc. in the case of Interstate Circuit, Inc., et al, Plaintiffs vs. City of Dallas, Defendant, Civil Action No. 3-1303, at a hearing before the

[File endorsement omitted]

Honorable Sarah T. Hughes, Judge of the United States District Court for the Northern District of Texas; said Judgment being entered on December 20, 1965, involving the identical Ordinance, the validity of which is being constitutionally attacked in this cause; that the Defendant in this cause, Interstate Circuit, Inc. appealed the decision of the United States District Court for the Northern District of Texas to the United States District Court for the Fifth Circuit in cause no. 23306 as follows: Interstate Circuit, Inc., et al, Appellee v. City of Dallas, Appellee, Appellant, which involved a cross-appeal by the City of Dallas.

Plaintiff would further show the Court that the United States Court of Appeal, Fifth Circuit, the above cause pending before it on January 20, 1966, denied the Motion of Appellees, Interstate Circuit, Inc., et al, for an injunction to enjoin the enforcement of the Ordinance involved herein pending decision on its appeal.

Therefore, this Honorable Court has no jurisdiction to entertain the Petition to relitigate these constitutional issues, which were raised or should have been raised in the trial in Federal Court involving the identical ordinance involved in the case at bar.

[fol. 36] II.

That the Intervention will complicate the issues in this case since the sole question before this Honorable Court is whether or not the Movie Classification Board of City of Dallas correctly classified the movie "Viva Maria", scheduled to be exhibited at the Esquire Theatre in the City of Dallas, Texas, beginning February 17, 1966, and any private contractual agreements between the Interstate Circuit, Inc., as Exhibitor and United Artists Corporation, as Distributor and owner of the District Distribution rights to said film, has no bearing whatsoever on the power of the Movie Classification Board in the enforcement of the Ordi-

nance in question to require the Exhibitor to advertise the film in question as "not suitable for young persons".

III.

That the Ordinance in question does not authorize the Movie Classification Board to suppress the exhibition of motion picture films, but merely limits the power of the Board to determine whether or not a film is "suitable for young persons" or "not suitable for young persons" and regulates the type of advertisement by requiring a film to carry the notation "suitable for young persons" or "not suitable for young persons" when so classified by the Classification Board, to be included in the advertisement.

Wherefore, Premises Considered, Plaintiff, City of Dallas, prays that such Petition in Intervention be stricken.

Respectfully submitted,

N. Alex Bickley, Ted P. MacMaster, Pat Stacy, Jerry Williamson, Attorneys for Plaintiff, City of Dallas, 501 City Hall, Dallas, Texas.

[fol. 37] Certificate of Service Pursuant to Rule 72 (omitted in printing).

[fol. 38]

IN THE 44TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS
No. 66-1280-B

CITY OF DALLAS, Plaintiff,

v.

INTERSTATE CIRCUIT, INC., Defendant.

PLAINTIFF'S FIRST SUPPLEMENTAL PETITION—
Filed February 17, 1966

To the Honorable Judge of Said Court:

Comes Now the City of Dallas, Plaintiff herein, and files this its First Supplemental Petition in answer to Defendant's Cross-Action heretofore filed, and would show the Court:

I.

Plaintiff excepts to Paragraph XIII of Defendant's Cross-Action on the ground that as a matter of law Plaintiff is not required to go into any court of competent jurisdiction to seek a declaratory judgment prior to the enforcement of an ordinance, particularly since the ordinance in question has been held to be valid by the Honorable Sarah T. Hughes, United States District Judge for the Northern District of Texas; and Defendant has appealed said ordinance to the United States Court of Appeals, Fifth Circuit, seeking an injunction to stay enforcement of said ordinance, which has been refused by the United States Court of

[File endorsement omitted]

Appeals on January 20, 1966 (a copy of which order of the District Court for the Northern District of Texas is attached hereto and made a part hereof for all purposes).

Plaintiff and Cross-Defendant would further show the Court that the filing of this suit is based upon facts in Freidman v. Maryland, and in doing so has complied with all requirements as set forth by the Supreme Court of the United States in that case, and that this cause seeks the prompt judicial determination as required by the applicable cases and law.

II.

Plaintiff and Cross-Defendant deny each and every allegation contained in Defendant's and Cross-Plaintiff's Cross-Action, and demand strict proof thereof.

Wherefore, Plaintiff and Cross-Defendant prays that said Cross-Action be in all things denied, and that in respect to same it go hence with its costs, and for such other [fol. 39] and further relief to which it may show itself entitled, either at law or in equity.

Respectfully submitted,

N. Alex Bickley, Ted P. MacMaster, Pat Stacy, Jerry Williamson, Attorneys for Plaintiff & Cross-Defendant, City of Dallas, 501 City Hall, Dallas, Texas 75201, RI-8-9711, Extension 295.

A copy of Plaintiff's First Supplemental Petition has been served upon the Attorney for Defendant and Cross-Plaintiff.

[fol. 39A] [File endorsement omitted]

[fol. 40]

IN THE 44TH JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

No. 66-1280-B

CITY OF DALLAS,

vs.

INTERSTATE CIRCUIT, INC.

STATEMENT OF FACTS—TEMPORARY INJUNCTION—
February 17, 1966

Judge Presiding: Honorable A. R. Stout, 40th Judicial District, Ellis County, Texas.

APPEARANCES:

For the Plaintiff: N. Alex Bickley, Ted P. MacMaster, Municipal Bulding, Dallas, Texas.

For the Defendant: Grover Hartt, Edwin Tobolowsky, Ed Creel, Tobolowsky, Hartt, Schlinger & Blalock, 3525 Southland Center, Dallas, Texas.

For the Intervenor: Paul Carrington, Dan McElroy, Robert Mow, Carrington, Johnson & Stephens, Mercantile Bank Building, Dallas, Texas.

[fol. 42]

COLLOQUY BETWEEN COURT AND COUNSEL RE EXHIBITS

Mr. Bickley: If the Court please, we ask the Court to take judicial notice of Ordinance 11284, which is attached to the Plaintiff's Original Petition and which we now introduce in evidence for all purposes, this being the theater classification, motion picture classification ordinance of the City of Dallas. It was passed on November 22, 1965, by the City Council of the City of Dallas.

Mr. Hartt: If the Court please, we do not believe this is a proper subject for judicial notice. We have no objection to a copy of the ordinance being produced, insofar as saying it is a true copy, if that will make any difference to the matter.

Mr. Bickley: We are introducing them in evidence before the Court, Your Honor.

The Court: Can I take judicial notice of an ordinance? I thought you had to identify and prove an ordinance.

Mr. Bickley: We have pled it, we have attached it, we are not at this time introducing it in evidence.

Mr. Hartt: If Your Honor please, we told Mr. MacMaster we would not require the city secretary to come down, if they brought a copy.

(Plaintiff's Exhibits 1 through 6 marked for identification.)

Mr. MacMaster: Your Honor, may I present some documentary evidence? Counsel for defendants and attorneys for plaintiff agree that these instruments can be introduced.

[fol. 43] Mr. Hartt: May I ask you a question? Was the first exhibit 11284?

Mr. MacMaster: That is right. I will call these out. Plaintiff offers as Plaintiff's Exhibit 1 a certified copy of Ordinance 11284 of the City of Dallas. Plaintiff's Exhibit No. 2 is Ordinance 11298, which amended Ordinance 11284 in that the Movie Classification Board could add three

additional members as alternate members of the board. Plaintiff's Exhibit No. 3 is a letter, certified copy of a letter dated January 24, 1966, from the defendant Interstate Circuit, Inc., by Raymond Willie, Vice President and General Manager, addressed to the Dallas Motion Picture Classification Board, in which it is stated that "Pursuant to Section 46A-3(a) of City Ordinance No. 11284, herewith is furnished material required. The undersigned hereby proposes to classify the above film for exhibition in the above theatre for initial exhibition in the City of Dallas as 'suitable for young persons.'" And at the top, "Motion Picture, Viva Maria!" and the theatre where it is proposed to be exhibited is the Esquire Theatre in the City of Dallas. Plaintiff's Exhibit No. 4 is a certified copy of the minutes of the Dallas Motion Picture Classification Board of February 9, 1966, in which the board, it was moved and seconded by a member of the board that the picture, "Viva Maria!" be classified as "Unsuitable for Young Persons," and this motion was adopted and there is a certified copy attached.

[fol. 44] Mr. Carrington: I want to make an exception to that offer in evidence.

Mr. Hartt: We will be doing the same.

Mr. Carrington: The exception I want to make is that insofar as showing what action the board took and limited to that purpose, it may be admissible, but as any evidence whatsoever of the character or quality of the picture or of any action of the board as binding or determining the quality of the picture or whether it should or should not be in any way restricted is not admissible.

Mr. MacMaster: Your Honor, it is being introduced at this time to show the action and classification by the Movie Classification Board.

Mr. Carrington: Limited to that?

Mr. MacMaster: At this time.

Mr. Hartt: If the Court please, Interstate would adopt the same objection made by the intervenor and add further thereto that while we agree that this is a true copy of

what the board did that it does not comply with the requirements of Ordinance 11284 in that it does not say why this picture, "Viva Maria!" is not suitable for exhibition for young persons. Directing the Court's attention to Exhibit No. 1, sub-section (f) of section 46A-1, there are two different reasons in great detail—perhaps even more, depending on how it is broken,—as to why a picture might not be suitable for classification, and this action of the [fol. 45] board does not say that that determination was made and that the present status of this action by the board does not show on what grounds this quasi-administrative or judicial action was taken. Specifically, the describing of brutality, criminal violence, depravity, et cetera, is one ground. Another ground is "Describing or portraying nudity beyond the customary limits—," et cetera. For that additional reason the defendant Interstate objects to the action of the Board insofar as it is reflected in this exhibit.

The Court: I will let him get it in the record subject to your objection and exception.

Mr. Hartt: Thank you, Your Honor.

Mr. MacMaster: We offer as Plaintiff's Exhibit No. 5 a certified copy of an official record of the City of Dallas, being a letter dated February 11, 1966, from the defendant Interstate Circuit, Inc., by Van Alen Hollomon, Secretary, addressed to the Dallas Motion Picture Classification Board, with reference to the motion picture, "Viva Maria!" to be exhibited at the Esquire Theatre, in which it is stated:. "Pursuant to Section 46A-7(a) of City Ordinance No. 11284, the above named exhibitor hereby notifies you of non-acceptance of your classification and advises that the above named exhibitor intends to exhibit the above named film under a classification of 'suitable for young persons.'" And it is from the Interstate Theatre. We offer that as Plaintiff's Exhibit 5.

[fol. 46] Mr. Carrington: Mr. MacMaster, the action of the board, the prior exhibit was introduced at your re-

quest for a limited purpose. All of the records of the City, including this you are now offering, is for the limited purpose of showing only what actions have been taken and not having anything to do with whether a valid ordinance has been entered or whether there has been any right to restrict the showing of this picture or any action that would be evidence on that subject, is that correct?

Mr. Bickley: And for the purpose of showing compliance with the ordinance, Your Honor, yes.

Mr. Carrington: Well, that is not me; that is not my letter, so I can't object to that.

Mr. MacMaster: The ordinance requires certain procedure. We are introducing these instruments to show that the procedure was followed.

Mr. Carrington: And for that limited purpose only?

Mr. Bickley: In other words, we reserve the right to prove what kind of picture is going to be exhibited out there.

Mr. Carrington: Later, not in this connection, is that right?

Mr. MacMaster: That is right. And we offer as Plaintiff's exhibit No. 6—Wait a minute. This should have been Exhibit No. 5; I have reversed exhibits. This should be 5 and the other one should be 6. This is a letter dated February 9, 1966, addressed to Mr. Raymond Willie, Vice [fol. 47] President and General Manager of the Interstate Circuit, Inc., Majestic Theatre Building, Dallas, Texas, from Harold G. Shank, City Secretary, City of Dallas, in which it reads: "Dear Mr. Willie: On February 9, 1966, the Dallas Motion Picture Classification Board met, and a majority of the board was not satisfied that your proposed classification of "Suitable for Young Persons" was proper for the following movies:" and one of them is "Viva Maria!" to be shown at the Esquire Theatre.

Mr. Hartt: If the Court please, as far as the letter being written, the defendant Interstate does not deny the letter was written on the 9th. We would further ask the stipulation to save time, however, so far as the exhibit Mr. MacMaster is just handing to the Court, No. 6, the further

stipulation could be made that it was mailed rather than hand delivered, is that correct? Did you mail the letter?

Mr. Bickley: That is correct.

Mr. Hartt: Then we would like a stipulation that it was received on the 10th of February, the day after it was written and mailed on the 9th.

Mr. Bickley: I think that is correct, Your Honor. We will so stipulate with counsel.

The Court: All right, sir.

Mr. Bickley: Your Honor, at this time we would like to introduce one other exhibit, which would be Plaintiff's Exhibit No. 7, which is a copy of the Plaintiff's Original Petition herein showing the file mark of February 14, 1966.

[fol. 48] (Plaintiff's Exhibit 7 marked for identification.)

Mr. Hartt: If the Court please, the exhibit last numbered, No. 7 I believe?

The Court: Seven.

Mr. Hartt: The copy of the petition to show the file mark, we would ask before making our objection that the plaintiff state the purpose for offering this exhibit. With that statement we may have an objection.

Mr. Bickley: The purpose of the exhibit, Your Honor, is to show compliance with the ordinance which requires that the case be filed within three days after the non-acceptance of classification.

The Court: The petition and filing or just the filing?

Mr. Bickley: Just the filing, for that purpose.

Mr. Hartt: The file mark on February 14, if that is the only thing offered, then we do not object to the mark itself because the petition has not been offered, as we understand. If the petition and mark is offered, we have an objection.

Mr. Bickley: Of course, we offer the petition as a part of the filing to show that an injunction was sought as required by the ordinance, for this limited purpose, not to show that the allegations in the petition are correct. It is

only for the limited purpose of showing compliance with the ordinance.

Mr. Hartt: If the Court please, we ask counsel to particularize which section of the ordinance he is complying [fol. 49] with on this filing. It might help us on our objection and we can otherwise start along.

Mr. Bickley: Your Honor, this is to comply with Section 46A-7 of the ordinance.

Mr. Hartt: In that event then we have an objection as follows: That the petition as filed here in Exhibit 7, together with the file mark, does not comply with the provisions of the ordinance to which counsel just referred, 46A-7. In particular, the sequence of events, as we understand them, required by this ordinance would be that, following the action of the review board denying the classification proposed by an exhibitor and giving a classification of "not suitable," which was done in this case by the letter of February 9, that the exhibitor has two days in which to reply and say he would not accept this changed classification. That was done by part of the documents already offered to the Court—I believe it is No. 6,—and in turn within three days after the non-acceptance from the exhibitor is given to the City Secretary, then the City of Dallas has the burden to come to a District Court of Dallas County and to ask for a judgment affirming the classification of the picture as "not suitable for young persons." We object to this Exhibit No. 7 as offered for that purpose of showing compliance because, as already raised by Special Exceptions filed herein, nowhere in this exhibit, consisting of approximately four pages, plus a copy of the ordinance, or five pages, four, I am sorry, nowhere in this [fol. 50] four page petition is there anything that asks for a district court of Dallas County to determine that the motion picture, "Viva Maria!" is not suitable for young persons in that it would violate either of the two sections of the ordinance we have heretofore mentioned to the Court, summarized and identified briefly as either nudity—

this would be, if the Court please, 46A-1(f),—nudity or criminal depravity. There is not a thing in this pleading—and this exception which the Court is carrying along goes directly to the same subject to which we are now objecting,—because this exhibit here we say does not qualify in any sense of the word, does not state a cause of action that would ask a Court to give the relief sought, which is required of the City by the terms of its own ordinance. If the Court please, this is a unique type of litigation the Court may not be familiar with. The case of Friedman vs. Maryland, which is a fairly recent case in motion pictures,—

The Court: No, I am not. All I have heard and read in these books is "pruient interests" and I don't know what that means.

Mr. Hartt: Friedman vs. Maryland. I have taken the liberty of having a copy of this book brought to the courtroom and I will hand it to the Court, if I may. That is the Friedman case, if the Court would like to look at it at his convenience. Friedman vs. Maryland, as we understand it, is authority for the proposition that any censor board or [fol. 51] anyone who attempts to restrict free communication has the burden, after making such a decision of the censorship or classification, of immediately going into a court and carrying the burden of proof into the court, there to have the court affirm the censor's decision, as it was in Maryland, in this case to affirm the decision of the classification board. In a word, you have got to get a declaratory judgment or an injunction in such terms as would sustain the fact that the picture is either censorable or, in this specific instance here, should be classified. Since there is no pleading on that, we object to this exhibit as an exhibit and we also have our exceptions to carry with it.

The Court: I will let him get it in the record and reserve judgment on it. This would be decisive, wouldn't it?

Mr. Hartt: Beg your pardon:

The Court: This goes to the whole case, does it not?

Mr. Hartt: Well, yes, sir. If the Court please, when we say it would be decisive, we would simply say if it is kept out, we think it is decisive. We think there are other things we think the Court might decide on in our favor. It is not the only issue.

The Court: I will let him get it in the record. I will reserve ruling on it.

Mr. Hartt: Thank you.

Mr. Bickley: At this time, Your Honor, we will have Mr. John Gilliland.

[fol. 52] JOHN GILLILAND, after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Bickley:

Q. State your name, please.

A. John D. Gilliland.

Q. Where do you live, Mr. Gilliland?

A. 8642 Hackney Lane, Dallas, Texas.

Q. You have previously been sworn in this case, have you not?

A. Yes, sir.

Q. And what is your profession, Mr. Gilliland?

A. I am an attorney.

Q. And how long have you practiced law?

A. I was licensed in 1958.

Q. Where do you practice?

A. Matthews & Matthews, Adolphus Tower.

Q. In the City of Dallas?

A. Yes, sir.

Q. What connection do you have with the Motion Picture Classification Board of the City of Dallas?

A. I am a member of the board, appointed by the City Council.

Q. And are you vice-chairman of that board?

A. Yes, sir.

Q. In that connection, do you recall the meeting of the board at which the request of Interstate Theatre, dated February 11, 1966, was presented to the board concerning a picture entitled "Viva Maria!"?

[fol. 53] A. Yes, sir.

Q. Are you familiar with the action taken by the board at that time?

A. On the initial request?

Q. On the initial request.

A. I believe the board requested a screening.

Q. And can you tell us why the board requested a screening?

Mr. Hartt: If the Court please, we are here on the action of the board, not the interpretation of a chairman, vice-chairman or any members of the board. To accommodate parties, we have stipulated that the minutes which they offered correctly show the action of the board. We object to this witness attempting to explain, qualify or give any extenuating comments that would expand or change the action of the board as recorded officially and already in evidence. In other words, the action of the board is in evidence. It is the best evidence and it speaks for itself. This witness is not in a position to explain, qualify or give it a different interpretation. There is no need for it.

The Court: I overrule it.

Mr. Hartt: Note our exception.

Q. Will you answer the question, please?

A. Your question was why did the board request a screening?

Q. Yes.

A. Based on the information submitted by the exhibitor, [fol. 54] it raised a question in the minds of some of the members and we felt that screening would be necessary for us to pass judgment on it.

Mr. Hartt: If the Court please, without continuing to pop up here and object, may I have a continuing exception

to this entire line regarding the board action?

The Court: Yes, yes.

Mr. Hartt: Thank you.

Q. By "the information submitted to the board," are you referring to the attachment to Plaintiff's Exhibit No. 3, which I now show you?

A. Yes, sir, the synopsis which is attached to the request.

Mr. Bickley: And which synopsis we now offer in evidence, Your Honor, as an admission by the defendants themselves as to the nature of the movie.

The Court: May I see it?

Mr. Bickley: Yes, sir.

Mr. Hartt: If the Court please, this is now Exhibit No. 8? I have an objection when the Court is ready to hear it.

The Court: What was "Tom Jones" about? Go ahead.

Mr. Hartt: If the Court please, our objection that we are about to make, we now make to this exhibit. As we understand, it was offered for the purpose of showing the nature of the picture. We object to it being received for that purpose. We would say, however, that this is part of [fol. 55] the papers given to the City, but insofar as the motion picture "Viva Maria!" is concerned, we would submit that it, and it alone, is the best evidence of what the picture is, and that if this is an attempt to evade or avoid having this Court review that picture before ruling, that it would be improper, and we object to it. In other words, the burden would be to see the picture and not to have, as was said by Judge Brown in the Empire case, a compurgation where dozens of people come down and tell you what they saw. The picture itself must be seen. If this is an attempt to avoid that, we object to it. As a synopsis given trying to comply with the ordinance, we do not object to it.

Mr. Bickley: If it please the Court, I agree with counsel's contention here that the Court see this movie. I think

it would be available this afternoon for the Court to see it, would it not?

Mr. Hartt: I don't know whether you have an operator.

Mr. Bickley: Since it is showing at one of the local movie houses, would it not be available, Mr. Hartt?

Mr. Hartt: The Court can go see it any time the Court wants to. We have no objection to that.

The Court: I will overrule your objection and let him offer it.

Mr. Hartt: This Court, as we understand the law, is restrained to acting in the courtroom and not going about the City, so it would be necessary to have it brought here [fol. 56] as a part of their burden of proof. If they want to do that, we will produce the film for them if they have both an operator and a machine.

Mr. Bickley: We are giving you notice to produce the film.

Mr. McElroy: We would, in behalf of the intervenor, join Interstate's objection to the tender of that exhibit and for the further reason that it was offered as an admission and it did not come from the intervenor, United Artists.

The Court: I will overrule it.

(Plaintiff's Exhibit 8 marked for identification.)

The Court: I will let him offer it as part of his case. There is a striptease referred to; I don't know whether it is a work of art.

Mr. Hartt: If the Court please, we would ask our intervenor, who owns the general rights to this print, to help us produce a copy. The copy which we have licensed is being used today in a theatre, but I am sure the intervenor will cooperate with us and try to get a copy as soon as one is available. We call upon them to aid the City, so whenever you want it brought to the courtroom, we will bring one.

Mr. MacMaster: We suggest that if they can produce the film, they bring it at noon today. It will probably last

about an hour and a half and I think the case will wind up an hour after that when the Court sees the film.

The Court: All that is before me right now, he has of-
[fol. 57] fered the exhibit, you objected and I overrule it.

Mr. Hartt: Note our exception.

The Court: He calls on you to produce the film.

Mr. Bickley: If it please the Court, I'd like to ask counsel if it would be possible—it is ten o'clock at this time—to produce the film before the showing starts this afternoon at the theatre itself. Would that be possible? We have this practical problem in this case, Your Honor, that we need a ruling from this Court one way or the other by tomorrow, which is the fifth day after the filing of the case, and so we would like for this to be produced in time that the Court might have it in order that it might be in evidence before that time so that the Court might act upon it.

Mr. Hartt: If the Court please, we hate to be a party to our own detriment. We are willing to cooperate. This is the first time we have been asked to produce this film. This film in this instance here today, this motion picture, is a copyright item licensed for exhibition here and will be shown at a theatre this afternoon, the exact time I do not know. I can find out. But it needs to be there, be prepared, wound and ready for projection in that theatre. If they wanted a copy of this film to be brought here and examined in this courtroom, they could have asked for it Monday or some other time. They haven't done it until now. When they come to bring this picture to this court for exhibition, they do have certain mechanical problems [fol. 58] which, as the plaintiff, they must face. One of them is a projection machine and an operator. Now, this film is a valuable item, and frankly it is substantially more than an eight millimeter pocket motion picture, and to get this set up and operate it, we say, is a major item. If they ask us to bring it here this afternoon, we will get it here as soon as we can get a copy other than the one in use in the theatre. We will try to do that. But in bringing it

here, it will have to be projected in this courtroom or someplace the Court designates; because being in trial in this court, we understand that this court needs to perform its judicial functions here in the courtroom and is not in a position, as we say, to go about and have a jury view or court view it away from the courthouse, and we have a brief that I think will sustain that, if the Court wishes that to be argued either now or at a later time.

The Court: I am inclined to agree with his statement that whatever exhibition is made, if any, should be made in the courtroom or courthouse.

Mr. Bickley: Well, I am inclined to agree with counsel in that respect, Your Honor, except by stipulation of parties and with consent of the Court I think it could be viewed at the theatre viewing room itself, and it would save all parties certainly a lot of time and money and trouble, if the Court so desired and counsel would agree.

Mr. Hartt: If the Court please, I hate to be disagreeable, but I am unable to concede to that, as it is a part of [fol. 59] the plaintiff's burden of proof and the plaintiff has been aware of the problem for sometime of having to get themselves equipped to show the pictures. If they are not prepared for it, we are not in a position to agree to it.

The Court: All right, sir.

Mr. Bickley: Are you prepared or will counsel produce the film at the time the Court suggests?

Mr. Hartt: Of course, insofar as possible I am going to do what the Court directs, and when the Court tells me to have a copy here, I am going to try to do exactly that. I would ask the Court now before making that order to bear in mind we do have this exhibition scheduled. In other words, if we can get another print here, we can bring one down and leave it for a day or so, if the Court wants it, but if the Court says, "Bring this down and put it in evidence and keep it," we'd like to bring it down whenever the Court wants it and have counsel project it with his operator and machine wherever he wants to show it in the courtroom and have permission to withdraw that exhibit

at a later time and produce it as many times as it may go to an appellate court, but not have it impounded and tied up for a long period of time. These prints are duplicates and one would do as well as another.

Mr. Bickley: We don't intend to impound this motion picture.

The Court: Well, I don't know. Have the thing here by two o'clock.

[fol. 60] Mr. Hartt: If the Court please, I need to make some telephone calls before I can advise the Court on that.

The Court: Suppose we take a little recess.

Mr. Carrington: May I make a suggestion here first? This petition of the City, as I understand it, is not based on any request that the Court determine that this picture is or is not suitable for young people. This petition of the City is not any request for a court determination of that subject. The Supreme Court of the United States, as counsel has already said, has decided that unless the Court does decide that, it can't be decided; in other words, that a board cannot make such a determination constitutionally and finally. Now, that would be binding and we have cases to submit to that proposition. This is no pleading here, there has been no pleading within the five day period under this ordinance requesting the relief that the City is now asking. They are asking for a Court determination that the ordinance providing for a board and for a board determination entitled them to an injunction from this Court, period. That is the substance of their complaint. They will fail under the Supreme Court of the United States decisions because the Court will not and should not determine that the determination of the board is binding on this Court. The case is that simple. To complicate it now with all of this determination by the Court is completely beyond their pleading, is completely a non sequitur as far as this case now filed is concerned, and we object [fol. 61] for that reason.

Mr. Bickley: If it please the Court, in answer to the objection, I'd like to state to the Court this: The ordinance

requires that we file in this Court for an injunction and that we enjoin them from exhibiting this picture under a contrary classification than that made by the board. The Supreme Court says what rules we shall follow in presenting our evidence and what our burden of proof is to get that injunction, and this is the thing that we intend to do, is to comply with that burden of proof and comply with the rules of evidence in getting the injunction. We have filed for the injunction, and the rules of evidence we intend to comply with in order that the Court might grant the injunction.

The Court: Well, you in effect now are calling on him to produce, as I understand it, as a matter of evidence, what is in his possession?

Mr. Bickley: That is correct.

The Court: I thought he was going to show some disposition to comply with it. I overrule the objection.

Mr. Hartt: If the Court please, I'd like to be heard further, if I may, on that same ruling.

The Court: Sure.

Mr. Hartt: By carrying these exceptions along which we have here, we have come to the pass we need to look at them again, if we may. Here is the problem: The time table the City has set up requires that they file suit within [fol. 62] three days and get an injunction in five days. Now, the petition which we have—and exceptions raise this—says in effect—and also my objection to Exhibit No. 7 said that this petition which is filed here objects to the advertising of the picture alone. There is not a scintilla in that entire petition now before this Court that asks for the relief, that asks this Court to determine that this motion picture is not suitable. They have passed a limitation period. They cannot now go back there. If they seek to amend, like amending on a statutory limitation, they are stating a new cause of action. The time to plead that expired Monday, February 14.

The Court: Say that again. That it was unsuitable, or to state the reason for it?

Mr. Hartt: If the Court please, sometimes the lawyer gets too close to his lawsuit. I may be. The Friedman case, as Mr. Carrington has just said, in effect requires that after a classification procedure such as we had in this suit, that any time anyone restricts free speech as a censor board or classifying board, that the classifying board or agency has the burden to immediately go to a Court of competent jurisdiction and get a declaratory judgment or injunction. I am using those terms out a little bit, but to get an affirmance of their decision that the subject material is subject to censorship. Now, that was the Friedman case. I can read from that if the Court wishes, to say exactly that thought. Now, this suit which is filed here on Monday [fol. 63] of this week, nowhere in a single paragraph asks that a determination be made that the picture, "Viva Maria!" be found not suitable for exhibition to young people. To the contrary, the only relief which is sought by the City in the petition before this Court is that a temporary and permanent injunction be granted against advertising—not showing—advertising the picture as suitable for young people. Now, there is a distinct and major difference. It is possible to take a picture so harmless as "Bambi" and have an injunction suit riding such as this one here. In other words, before this Court should give any injunction or any Court should give any injunction about the advertising, the crucial fact determining the whole matter should be "Is the picture itself not suitable for exhibition to young people?" If the Court will scan through that petition, that relief is not asked for anywhere, starting with Paragraph One on through. Now, failing that kind of pleading, then they have missed their three day limitation found in their own ordinance found in Section 46A-7, subsection 1, and their suit has not been filed and therefore their entire suit for a temporary injunction really is moot because they haven't followed their own procedures.

The Court: Oh, I overrule that objection, Counselor.

Mr. Hartt: Well, note our exception, if the Court please. Now we get to the point of having a recess and seeing if we can get a copy of the picture.

The Court: All right. Take fifteen minutes.

[fol. 64] (Court was in recess, after which time the following proceedings were had:)

Mr. McElroy: Your Honor, we have a report to make. We have contacted the local branch office of United Artists Corporation and have been advised that there is but one print of "Viva Maria!" within the City of Dallas. It is that print presently at the Esquire Theatre. We have no scheduled date for another print of "Viva Maria!" to arrive in Dallas, though realistically we do expect one next week. I do not know what day next week.

Mr. Bickley: If it please the Court, the one print is not being used in the morning hours; the theatre is not open in the morning hours. The first run starts this afternoon, as I understand it, about one or two o'clock. And so I see no reason why it cannot be viewed in the morning hours, even though there is only one print.

Mr. Hartt: If the Court please, we can bring the print down here now but we need to get it back out there. I hate to do a useless act; the law hardly ever requires a useless act to be done. If they don't have a machine and projectionist, operator, to do the tote and carry exercise is unnecessary. We can bring it down tomorrow morning if they have a projection machine here and an operator; we can bring it down Monday morning; whatever the Court wants.

Mr. Bickley: If it please the Court, the projectionist and the machine being within their control, we assume [fol. 65] they will supply them. If not, we shall issue a subpoena in order that he might be subpoenaed over here with his machine and with his print and with his movie and with the equipment to show it. Now, we submit to the Court and to counsel that the practical thing to do, and I

think it could be done if the Court so ruled, would be to show it in their viewing room which they have, where they have the equipment, they have the projector, they have everything available involved in this particular lawsuit.

Mr. Hartt: If the Court please, a recent case by a New York District Court pointed out on a custom matter the government's position there as being, in effect, if you would agree to this it would simplify things a whole lot for us. Now, obviously anybody who rolls over and plays dead, there is no problems, but when we are faced with an equity matter and they ask injunctive relief and they are plaintiffs, we do not feel that we have any duty, legal or equitable, to participate in having a judgment entered against ourselves. We come here as officers of this court, doing exactly what the Court wants, but if they come to the courthouse as plaintiffs, they come here seeking relief under the rules of procedure, and rules of procedure require that the Court try, and the statutes require him to try a case in the courthouse. If they are not prepared to meet their burden as plaintiff, we as defendants do not need to preside over, as Churchill said, the dissolution of the Empire or our own judgment against us. We have a right to stand [fol. 66] here and ask them to prove their case, not with our equipment or anything else. We will cooperate and bring a print, but if the Court is not aware of the difficulty and sometimes the problems the plaintiff faces, the plaintiff certainly well knew it when he filed this suit and knew it in advance. These films need to be shown in this courtroom. They need to get themselves—like any lawyer has a slide projector with slides—a motion picture projector if it is motion pictures. They need one of those and they need an operator who is competent to run it and they ought to have them here as part of their burden to prove their case. We see no reason why we should in effect give them that which they know they need as a part of their own prima facie case. This is not a matter of discovery. Evidence we produce for them and we will produce exactly a print of the film at the time the Court says get it here,

but as the Court is well aware, you cannot go and take expert opinions from a doctor or an expert and not pay him for his services and his work, and a subpoena, they threaten us with that, to come here and bring that kind of machine by subpoena, the drayage cost and these other items are all ones which they must stand before the subpoena would be good. If they want to get a projector, those things can be bought or they can acquire one, but we certainly object to it. We will bring the print here in the morning, if the Court directs.

The Court: Have you got any other proof that you want [fol. 67] to offer?

Mr. Bickley: Yes, we do have, Your Honor.

The Court: Proceed.

Q. (By Mr. Bickley) Mr. Gilliland, what did the board do following the submission, or following their first meeting on the classification of the film, "Viva Maria!"?

A. Well, the board voted to have the movie screened and we later received notice that a screening would be held. I believe it was at South Harwood, General Films' distributor's screening room over there. I believe five members of the board met on February 7, Monday, and at that time viewed the film.

Mr. Bickley: Will counsel stipulate that the filming and the viewing of the film was by agreement with counsel and with their client at a time and place they made it available?

Mr. Hartt: If the Court please, I am not aware that it is or isn't. May I speak with counsel for a moment? If the Court please, I cannot have it confirmed. Let me have it read back and I think we will agree to it.

Court Reporter: "Will counsel stipulate that the filming and the viewing of the film was by agreement with counsel and with their client at a time and place they made it available?"

Mr. Hartt: We agree the client apparently produced it at the time and place. I was not personally aware of it.

Q. Then at the time and place the film was made available, did you and others view that film?

[fol. 68] A. Yes, sir.

Mr. Carrington: If the Court please, I would like for the intervenor to make an exception which may run to more than one question. In the first place, the objection we are making to the use of this witness to determine what the board did is an effort to vary the records of the board itself as introduced in evidence here and that is not admissible, enlarging or varying by parole testimony those records. Secondly and also of the essence is the objection that the action of the board cannot control or guide or even be admissible on the merits of whether this is or is not a properly objectionable picture that ought to be restrained in its exhibition, and this introduction of evidence, or any evidence as to what the board did or what individual members of the board thought with reference to it or how or why they acted is inadmissible for that reason. I would like both of those objections to be made and acted on by the Court and then see whether he is going to let this witness proceed.

The Court: Overrule it.

Mr. Carrington: We don't need to repeat it?

The Court: No, sir, it will be to all his testimony.

Mr. Hartt: For record purposes we adopt the objection, and I presume the same ruling of the Court?

The Court: All right, sir.

Mr. Hartt: Thank you.

Q. Did you and several others view the film at that time?

[fol. 69] A. Yes, sir.

Q. Members of the Motion Picture Classification Board of the City of Dallas?

A. Yes, sir.

Q. Would you tell the Court the nature of the film that you saw entitled "Viva Maria!" at that showing?

A. Would you like for me to take it from the beginning and just explain what the story was about?

Q. Tell what you saw in the film, yes.

Mr. Hartt: If the Court please, the Court has heard this before but I would like to hit the question of best evidence and also relate this exact quote from Judge Brown's opinion where similar proceedings were followed before Judge Davidson. The picture is the best evidence and speaks for itself. In the Empire case Judge Davidson let this testimony come in. Judge Brown called it "By a sort of modern compurgation he allowed each side to produce three witnesses to describe the movie and its questionable scenes. This, as to be expected, was about as revealing as program notes to a symphony concert." We are going far away here on this kind of item and we do object to it because the picture is the best evidence.

Mr. Bickley: If it please the Court, I agree with him. I think the picture is the best evidence and I think the Court will have to see that picture in order to rule upon it, and I think the other will only be supplementary to it, [fol. 70] and that is the reason we ask them to produce the picture in order that the Court might see it.

The Court: I overrule the objection.

Q. Will you explain the movie as you saw it?

Mr. Hartt: Note our exception.

A. All right. In the beginning the scene was, I believe, in England, early twentieth century. To make a long story short, a character played by Brigitte Bardot was the daughter of an Irishman who was fighting the English. His main job seemed to be blowing up buildings and bridges and railroad trestles and whatever would aggravate the English. In one of these explosion scenes the father was caught by the authorities and shot to death and Maria was on her own from then on. She at that time, up to that time had been a boy, in effect; she had worn boy's clothes and had carried on all activities of a boy. In her

travels after her father was killed she came across a carnival, a traveling carnival of the kind you see with wagons, with different acts. It was kind of a circus on wheels. She crept into the wagon of one of the participants in the carnival whose name was also Maria and who had a song and dance act. They became friends and the carnival adopted Maria No. 1, we will say, and then a team of two, Maria and Maria, became a song and dance act. Now, the striptease referred to in the synopsis occurred when the character played by Brigitte Bardot accidentally tore her dress during her first song and dance act. One thing led to an- [fol. 71] other and the act developed into this, into a rather sophisticated striptease. That in itself was not objectionable. There was no nudity or anything involved there. However, Maria became aware that she was a woman, and I think this is one of the major factors which caused the board to decide as it did. She asked her partner, the other Maria, to explain to her what about love, and Maria did explain to her what she knew about love, which consisted of going to bed with a couple or three men in her past and the experiences she had had. With this—And this took place at a party in which all the members of the carnival were present, and strangers also were present. With this, to make a long story short, Maria went off with three strange men and returned the next morning with her clothes torn and explained to her friend Maria how great it was, and then she began to keep a list of names on the wall of the wagon that she travelled in, kept a running account of the men she went to bed with. This more or less continued throughout the movie and the last man that she kissed good-by—I will jump ahead for a moment—was another man apparently whom she had gone to bed with. Anyway, at a point I guess about midway in the picture the carnival became involved in a revolution. It looked like a Mexican revolution where there was one man, whose name I don't recall, who had control of the peasants in the area. There was also a general, a Napoleonic type character who was under the control of the

[fol. 72] leader, and a clergyman who apparently was the head priest or head bishop, whatever his title was, there in the area. These were the three main characters in the revolution. The leader of the revolutionary forces or the peasants was captured and Maria No. 2, or the friend of Brigitte Bardot, fell in love with this man. She partially undressed herself in the jail when her man was in the stocks there and tore his shirt off and from then on it was left to the imagination. But he was killed and then the second Maria took up the cause for him, and from that point on it was her leading the peasants and then the character played by Brigitte, having had a past experience in explosives, took up with her and they ultimately defeated the tyrannical rule of the leader, whoever it was, of the government forces. At one point it seemed that everything was getting out of control as far as the government was concerned and the priest took over. He and one other priest commandeered a train or, we will say, stopped a train on which the carnival people and the peasants were riding on their way to their final battle. Once on the train he captured at gunpoint the two Marias, took the car they were riding in and the engine and went—well, it wasn't a castle but it was the ranchero where this government leader lived. He took them then down to a dungeon and engineered a torture process of putting them on a—I forget what they call it; the rack we will say,—and torturing them. Now, he wanted to get them to sign a confession. The clergy, as I recall, when they were first brought in, [fol. 73] the clergy were all in black hoods similar to the Ku Klux Klan in white. They took them down to the dungeon and all participated in this torture process to get them to sign this confession. They got out of this scrape and ultimately won the battle, with a period in there of no romance particularly. But again the final scene where the morning after the night before the carnival rides off in the sunset, so to speak, and Maria embraces her last lover and trots on off. And that generally was the picture.

Q. The basis for your vote and for the others on that, was it based upon any particular scene in the movie or the movie as a whole?

A. No particular scene guided our judgment, no, sir.

Q. Are you a man of family?

A. Yes, sir.

Q. How many children do you have?

A. Two boys.

Q. And in your opinion as a father, would this tend to affect the behavior of young people below the age of sixteen years?

Mr. Hartt: If the Court please, we object to the qualifying of this witness by simple paternity as showing he has any particular skill or ability other than the fact that he, like most people are, is the father of minor children. That does not qualify him to give an opinion on this subject. He has been qualified as a lawyer. If he has any particular skill to start talking about how this affects other [fol. 74] people, he has not yet shown it, and we submit that the fact of being a father alone does not qualify him to give any expert opinion on this subject as to how it would affect or effect other children. Now, we will take the witness on voir dire, if you wish, or counsel can develop his qualifications, but on the qualification as stated, we object to the testimony.

Mr. McElroy: We join in that objection.

The Court: I overrule it.

Mr. Hartt: Note our exception.

A. Yes, I think it would influence young children.

Q. And how many members of the board actually viewed that film?

A. Five members.

Q. Was the opinion of these five members in voting concerning this film a unanimous vote?

A. As far as I recall, yes, sir.

Q. Now, you have been a member of this board since it was actually appointed by the City Council, have you not?

A. Yes, sir.

Q. How many films in general have you had before this board? Do you know?

A. Roughly about two hundred and twenty films.

Q. Two hundred twenty have been submitted?

A. Yes, sir, that is a rough estimate.

Q. Of that two hundred twenty, how many have the board on their own motion declared to be not suitable for young persons? If you know.

[fol. 75] Mr. McElroy: We object to that as being wholly immaterial and irrelevant.

The Court: I will overrule it as to whether they are arbitrary and that phase of it.

A. I believe about a half dozen films have been classified as unsuitable.

Q. Have you had others that have been classified as not suitable by the industry itself?

A. Yes.

Q. So the half dozen you are talking about are those you disagreed with the industry or the exhibitor?

A. Yes, sir.

Q. All right. Now, for purposes of the record, do you know whether or not the producer of this film, as Mr. Carrington and his firm are representing, whether or not they submit any classifications to the board, or is it the local exhibitor that does that? Do you know?

A. I couldn't answer that, no, sir.

Q. All right. Then following the seeing of the picture, did the board authorize the secretary of the board to notify the exhibitor of the board's designation?

A. Yes, sir.

Q. And the letter of the 9th of February, being Exhibit No. 6,—I want to get it straight whether it is five or six. May it please the Court and for counsel, we'd like to get the exhibit numbers on these straightened out. The one of [fol. 76] the 9th of February should be No. 5 and the 11th of February No. 6.

(Plaintiff's Exhibit 5 marked as Plaintiff's Exhibit 6; Plaintiff's Exhibit 6 marked as Plaintiff's Exhibit 5.)

Mr. Hartt: For the purpose of the record, let's state that, please, so the reporter will understand what is done.

Mr. Bickley: For the purpose of the record, the letter dated February 9, 1966, addressed to Mr. Raymond Willie, Vice-president and general manager of Interstate Circuit, Inc., signed by Harold G. Shank, City Secretary, is Plaintiff's Exhibit No. 5. The letter of February 11, signed by Mr. Van Alen Hollomon as secretary of Interstate Circuit, Inc., to the Dallas Motion Picture Classification Board is Plaintiff's Exhibit No. 6.

Q. I show you Plaintiff's Exhibit No. 5 and ask you if that was in accordance, the letter was written in accordance with the desires of the board or as the board indicated?

A. Yes, sir.

Q. Subsequent to that time, did the board take any further action concerning this or was the subsequent action that of the attorneys, as far as you know?

A. As far as I know, no further action was had by the board.

Q. Were you aware of the letter of February 11, 1966, being Plaintiff's Exhibit No. 6, stating—from Interstate Circuit, Inc.,—stating they did not desire to comply with the classification set by the board?

A. This was called to our attention at the last meeting, [fol. 77] which I think was on the 15th of this month, if I am not mistaken.

(Plaintiff's Exhibit 9 marked for identification.)

Q. I show you an advertisement in the newspaper of the Dallas Morning News, dated February 16, 1966, which has been marked as Plaintiff's Exhibit No. 9, and ask you if that is the movie about which you have been testifying, the one that is advertised there?

A. It appears to be, yes, sir.

Mr. Bickley: We offer it in evidence, Your Honor.

Mr. Hartt: If the Court please, we understand that only that portion is to be offered. If counsel wishes to mark it, it might be more convenient for the record, but we have no objection to that.

Mr. Bickley: It is marked in red. I call the attention of the Court to the fact that it contains no classification whatsoever. No further questions.

Cross examination.

By Mr. Hartt:

Q. Mr. Gilliland, the board did not make a specific finding in its exhibit at all as to what part of this ordinance caused this picture to be classified as not suitable, did it? For record purposes, I am handing you Plaintiff's Exhibit No. 4, that portion here which I will read: "The movie 'Viva Maria!' (Esquire) heretofore taken under advisement for screening, was again called. After discussion, it was moved by Reverend Maceo and seconded by Mrs. Ellis [fol. 78] that the movie 'Viva Maria!' be classified as 'Unsuitable for Young Persons.' Motion carried, Mrs. Ornish not voting." Is that correct?

A. Yes, sir.

Q. As a matter of fact, you made an error right there, didn't you, sir?

A. How is that?

Q. Well, there is no classification "Unsuitable for Young Persons" in your ordinance, is there?

A. No, sir, it is "Not suitable."

Q. But that was the only action that the board took?

A. On this movie, yes, sir.

Q. Then so far as this picture is concerned,—if the Court please, before starting this line of interrogation, I do not wish to waive my objections by going into it. May I proceed under that presumption?

The Court: I think the law gives you that right.

Mr. Hartt: It is my understanding, but I want to be sure we understand each other on it.

Mr. Bickley: We think the law applies, however, it applies, to any interrogation he might make.

The Court: Proceed. I can't grant you any immunity.

Q. The action of the board did not find this picture to be "describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the board, likely to incite or encourage crime or delinquency on the part of young persons," did it?

[fol. 79] A. The minutes do not state that language, no, sir.

Q. As a matter of fact, back to your own opinion from viewing that picture, you do not consider it to encourage or incite crime or delinquency on the part of young persons, do you?

A. Well, I think the ordinance talks about the judgment of the board, if the movie tends to do these things. The board has to rule on this basis. Now, if you are asking me personally,—

Q. Yes, sir.

A. —I think, as far as the violence portion goes, when the clergy got tangled up in it really was the only thing, as far as violence goes. That was not very good as far as I was concerned because it really in a sense okayed violence because the clergy really was the perpetrators of the violence. In that sense I think it falls under that portion. At least that was my opinion.

Q. Wouldn't it be fair to say that that portion was considered by you to be sacrilegious?

A. I don't think of it in that sense myself, but I am sure that entered into it.

Q. You are sure that entered into it. Thank you. This picture had a lot of what could be called spoofing or poking of fun, didn't it?

A. Yes, there was some of that.

Q. As a matter of fact, that was substantially in it all the way through?

A. More so in some parts than in others.

[fol. 80] Q. Well, at one time for example didn't we find when the revolution was going real good and there was sandbags, it looked like, in front of the bank and someone threw an explosive, when it exploded, instead of being sand, it was gold coins that blew all over the street?

A. Right.

Q. You don't think that would cause anybody to use gold coins for a sand bag filler?

A. No, sir.

Q. And the sort of dove of peace air force in there could be a spoof? It was a little pigeon that flew around and carried grenades to where they needed to be dropped?

Mr. Bickley: I am not sure I know what counsel means by "spoof." I don't know whether the witness does or not.

The Court: Well, all in fun, I take it.

Q. They were inducing laughter and kidding people at large, were they not?

A. Yes, sir.

Q. In other words, you don't really think anybody used a dove as transporting grenades to where a machine gun nest was, do you?

A. It seems a little far fetched.

Q. And that is what would be gleaned by anybody watching that picture, isn't that true?

A. I am sure that would be true.

Q. There was also a great experiment about a rifle shooting around a corner. That was also some pretty good fun?

[fol. 81] A. A shotgun, yes, sir.

Q. Shotgun. All right.

A. Yes, sir.

Q. It had a big bent barrel, about a ninety degree turn, is that correct?

A. Yes, sir.

Q. There was some nude statuary in the house of this landowner where the girls were taken, is that not true?

A. I believe that is correct.

The Court: There was what?

Q. Nude statuary. Did that statuary offend the board? Those female forms in marble or plaster?

A. I can't speak for anyone else. It didn't offend me; I can say that.

Q. Did you find this picture to describe or portray nudity beyond the customary limits of candor?

A. Not nudity; sexual promiscuity.

Q. So far as sexual promiscuity, I believe you used the phrase that it was left to your imagination after the girl returned from the night at the carnival, is that not true?

A. Yes, sir, I would say that.

Q. As a matter of fact, you did not see any actual love making between, as you said, the first Maria and any of the men in the picture at any time, did you?

A. Actual love making, no, sir.

Q. All right. And it was only a matter of imagination [fol. 82] each time, wasn't it?

A. Yes, sir.

Q. Did you ever see any other Brigitte Bardot pictures such as "And God Created Woman"?

A. I missed that one.

Q. That was the first picture she made some years ago. Did the fact she was in the picture influence the board?

Mr. Bickley: May it please the Court, we think this is immaterial and irrelevant as to what other pictures she might have made.

The Court: I overrule it.

Mr. Bickley: Note our exception.

A. I don't think just the fact she was an actress in the movie had anything to do with it, no, sir. It didn't in my mind, as far as that goes.

Q. This picture was made in color, was it not?

A. Yes, sir.

Q. And the scenery was generally pretty, was it not?

A. Yes, sir.

Q. The photography was good?

A. I thought so.

Q. And in summary you might say it did have some artistic value, did it not?

A. I think so.

Mr. Hartt: I believe that is all, Your Honor.

[fol. 83] Cross examination.

By Mr. McElroy:

Q. Mr. Gilliland, as I understand, there are two aspects of the movie which at least in your mind you have found objectionable. One such portion of the movie had to do with the clergy and the violence and the other had to do with sexual promiscuity, is that not correct?

A. Yes, sir.

Q. Now, with respect to the clergy and the violence and your feeling that there was something sacrilegious about it, isn't it a fact that all of the violence the clergy was involved in was farcical?

A. Farcical, you said?

Q. Yes.

A. I think part of it was, yes, sir, I believe so.

Q. Well, for instance, when they tried to squeeze the girl's head in the vise, what happened to the vise?

A. The vise broke. I remember that.

Q. When the clergymen would go to get an instrument of torture, what would happen to the clergyman?

A. I remember when they were trying to get them set up, apparently they were pretty clumsy at the job because the clergyman would fall down or break something or something along those lines. I don't recall exactly what happened.

Q. Or the trap they were going to get to put on one of the girls would in effect trap the clergyman, would it not?

A. That happened.

[fol. 84] Q. And they went to get tongs with which they were going to torture the girls and the tongs came apart, did they not?

A. I believe that happened too, yes, sir.

Q. And you did not consider that clergy scene and the would-be torture chamber as being a farce, a big spoof?

A. Those particular portions you described, yes, sir; I think it was comical, I will put it that way.

Q. Now then, we get to the question of sexual promiscuity. You said that she put a list of—"she" being one or the other of the Marias—had a list of names of the men with whom she had been to bed?

A. Yes, sir.

Q. There was none of the going to bed with men shown in the movie in any respect, was there?

A. No, sir.

Q. So you were assuming or concluding that that is what the list of names was?

A. Yes, sir.

Q. And the final scene when you say the carnival goes away the next morning and one of the Marias is kissing a man good by,—

A. Right.

Q. —you said that that was the man with whom she had been in bed the night before, did you not?

A. I believe so, yes, sir.

Q. What in the movie gave you that impression?

A. As I recall, I think her clothes were torn again some-[fol. 85] what at that time. It left the impression of being another one of the many during the course of the movie.

Q. See if this is in accordance with your recollection of this particular scene. The battle is won, the revolution is over, the poor clergyman is going down the stairs holding his head in his hands, so to speak, and that cuts out there, does it not, and the next scene of the movie picks up the next morning with one of the Marias in a crowd in broad daylight as the carnival leaves town.

A. Correct.

Q. She leaves the crowd, gets on the carnival wagon and the carnival leaves town. That is an accurate portrayal of what you saw, is it not?

A. As I recall, yes, sir.

Q. You are vice-chairman of the Motion Picture Classification Board, as I understand it?

A. That is correct.

Q. Do you know of any procedure in the Dallas Motion Picture Classification Ordinance that provides for any notice of any character as to any action to be taken by the board to be given to a distributor of the film being reviewed?

A. I don't recall whether the distributor is to receive notice or not.

Q. Do you have any personal knowledge—Well, as a matter of fact, you know for a fact, do you not, that with respect to the picture "Viva Maria!" the board itself, act-
[fol. 86] ing through the City Secretary or any other official member, gave no notice of the action taken by the board in classifying the picture, is that not correct?

A. Now, by the board itself, I know the City Secretary wrote a letter.

Q. And you know he wrote a letter to Interstate Circuit, the exhibitor, do you not?

A. Yes, sir.

Q. And that letter has been marked in evidence here this morning?

A. The same letter, yes, sir.

Q. Do you not also know, as a fact, sir, that the City Secretary sent no notice to United Artists in connection with "Viva Maria!"?

A. I don't know whether one was sent or not, honestly.

Q. You have no knowledge of it at all?

A. No, sir, I don't.

Q. As a lawyer and as vice-chairman of the board additionally, I would hazard the guess you have studied the Dallas ordinance rather carefully?

A. I have studied the ordinance insofar as the duties of the board are spelled out.

Q. Right. In that studying of the ordinance, did you find there to be any duty whatsoever on the board to notify a distributor of actions taken by the board?

Mr. Bickley: If it please the Court, I think this line of questioning could be shortened. I think the ordinance [fol. 87] speaks for itself as to who should be notified.

The Court: As to his client, I will let him ask it.

A. You asked me if I knew?

Q. I think the question was, based on your study of the ordinance, do you know that there is no provision in the ordinance requiring the giving of any notice to the distributor of motion picture films?

Mr. MacMaster: If Your Honor please, we would like to make the additional objection the ordinance does not provide for notice to the distributor of the film. There is no way for the board to know who distributes it. The exhibitor gets the notice. There is no way for the Movie Classification Board to know who made the film or who distributes it.

The Court: I will let him make his proof.

A. That ordinance does not have any provision as far as the distributor is concerned. I'd have to look at it again to know for sure, but I don't recall any provision like that.

Q. Now specifically with respect to "Viva Maria!" how many members or substitute members of the board screened or viewed that film?

A. Five members.

Q. And when did the board take its action with respect to that film? Did they take it the same day that the film was viewed or at a later date?

A. No, the official, the vote was taken at the next meeting, which was Wednesday, I believe it was the 9th of February, [fol. 88] following the screening.

Q. And as I understand the records of the board, there were members of the board who voted to classify the film as not suitable who had not seen the film?

A. I think so, yes, sir.

Q. Now, without telling me what was said, I will merely ask you, sir, was there a general discussion of "Viva Maria!" before a vote was taken?

A. Yes, sir.

Q. As to whether or not it should be classified?

A. Yes, sir.

Q. Did the various members of the board detail what they had seen in the film as you testified, for instance?

A. Yes, as I recall there was a fairly lengthy discussion on this movie.

Q. And those board members who had seen the film would describe it in general terms and then other members of the board who hadn't seen it would participate and the vote would be taken?

A. Yes, sir.

Q. Dates are hard to keep in mind and I am not trying to get specific dates, but I think the letter indicates that the board's action with respect to "Viva Maria!" was taken on the 9th. If I recall correctly, that was a Wednesday?

A. I believe that is correct, sir.

Q. With respect to that Wednesday, when was the picture screened?

A. The picture was screened on the Monday prior; that [fol. 89] would be February 7, prior to the Wednesday meeting.

Q. Now, if I understood you correctly,—and I do not wish to misstate what I understood you to say,—it is my recollection of your testimony that you said that in your opinion the movie had a tendency to influence children. Did you say that or something like that this morning?

A. That it would have an influence on children, something to that effect.

Q. What influence on children do you think "Viva Maria!" would have?

A. Well, it would have a number of influences, really.

Q. Which ones, sir, in your judgment?

A. Well, I will start with the one that—Well, in the first place, the scenes that you have mentioned and that Mr. Hartt has mentioned, for instance, I think a lot of them

were far fetched; I think there would be some comedy, in fact, involved in the movie; I think that would be fine. The influence which I spoke about and which I think the board as a whole generally decided on would be the fact that love, as discussed by the key characters and as portrayed, would be limited to the strict sense of lust or sexual engagement with virtually anything that wore pants, which was what Maria engaged in from time to time. Really, it was portrayed as being acceptable and very agreeable and there was no redeeming factor along those lines anywhere in the movie.

Q. Now, when you say "love as discussed by the leading [fol. 90] characters," now, it is a fact, is it not, that you are referring only to one very, very brief discussion between the two Marias after the night of the carnival?

A. I don't remember how long the discussion was, but that and the morning after the night before was a brief discussion, and I think from that point on there was no particular discussion along those lines, just a continuation of a pattern.

Mr. McElroy: Thank you, Mr. Gilliland. We have no more questions.

Redirect examination.

By Mr. Bickley:

Q. Were there any scenes in the movie that portrayed the women disrobing the men?

A. One scene involved that sort of thing. This is the one mentioned earlier where the hero of the revolution was chained up in the jail and Maria No. 2—there was a strong man in the movie—Maria No. 2 started rattling the bars because she wanted to get in to see her hero and the strong man parted the bars for her. She went in, embraced him, they spoke,—I don't remember what they said particularly,—but she tore his shirt off to the waist, and as far as disrobing goes, that is all she did to him. I think she tore her shirt off partially, or wholly off maybe.

Q. Was there any indication that she disrobed him any further or any hint of it or any such thing as that?

A. Well, there was some indication. The camera, of course, did not allow any particular view.

[fol. 91] Q. This was the part left to the imagination, if any, is that right?

A. I'd say so, yes, sir.

Q. Were there any scenes of seduction in the movie, as you recall?

A. Seduction. At this time I don't remember if there were any such scenes or not.

Q. Was the general—What was the general tenor of the movie so far as sex was concerned, in your opinion?

A. It was a strain that was carried throughout the movie, I think. Regardless of what happened, it was one of these things that was still there, still present.

Q. Well, what type of sex?

A. Well, as I said before, from start to finish it was a loose sort of conduct, we will say, promiscuous sort of thing.

Q. Was it portrayed in the sense of being acceptable?

A. Very much so.

Q. Portrayed in the sense of being desirable?

A. Very much so.

Mr. Hartt: If the Court please, we object to leading the witness.

The Court: Don't lead him, counsel.

Q. Yes, sir. Were all of the scenes concerning the clergy farcical scenes or what they refer to around here as spoof?

Mr. Hartt: He is again leading, if the Court please.

The Court: I think it is leading. Sustain the objection.

Q. Would you say—Describe the effect, if you can, of the [fol. 92] use of the clergy in this film on the viewers of the film.

A. The clergy was, in this sense, denoted as being an integral part of or being a part of the leadership of the

oppression or the violent activities, we will say, which took place, and when things got out of hand for the Napoleonic type general, the clergy then took over and carried on from that point forward.

Mr. Bickley: In order to bring it up to date, Your Honor, we'd like to offer in evidence Plaintiff's Exhibit No. 10. Would you mark this, please?

(Plaintiff's Exhibit 10 marked for identification.)

Mr. Hartt: With the same limitation, if the Court please, the photograph being marked I presume you identified, no objection.

Mr. Bickley: We offer in evidence Plaintiff's Exhibit No. 10, which is the advertisement of this film, "Viva Maria!"

Q. Is this the same one about which you have been talking, Mr. Gilliland?

A. Yes, sir, it appears to be.

Mr. Bickley: Which shows to be in the paper of the Dallas Morning News of Thursday, February 17, which is this morning's paper. It has no classification on it. No further questions.

Mr. Hartt: Nothing further here, Your Honor.

Mr. McElroy: We have nothing further, Your Honor.

[fol. 93] James Robert Maceo, after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. MacMaster:

Q. Will you please state your name to the Court?

A. James Robert Maceo.

Q. You are a member of the clergy?

A. Yes, I am.

Q. What religion?
A. The Episcopal Church.
Q. Are you a pastor of the Episcopal Church in Dallas?
A. I am rector of Saint Paul's Episcopal Church.
Q. Where is that located?
A. 1302 West Keist Boulevard.

Mr. Carrington: If the Court please, may we have the same objection generally throughout the interrogation of this witness that we made as of the other witness?
The Court: Yes, sir.
Mr. Hartt: And also the defendant Interstate makes the same request.
The Court: Surely.
Mr. Hartt: Thank you.

Q. How large is your parish? Would you classify your parish by the number of families in the parish?
A. It is classified as a parish when it is financially self-supporting.
[fol. 94] Q. And how many families?
A. Families?
Q. Yes.
A. Approximately a hundred and sixty.
Q. Are you a member of the City of Dallas Motion Picture Classification Board?
A. Yes, I am.
Q. And you were appointed by the City Council of the City of Dallas?
A. Correct.
Q. In connection with your duties on the Motion Picture Classification Board, did you have occasion to view the screening of the movie, "Viva Maria!"?
A. Yes, I did.
Q. Were you present with other members of the Motion Picture Classification Board on that occasion to determine the type of classification which should be given to this movie?
A. Yes, I was.

Q. And how many members of the board viewed the movie of that with you?

A. There were four others, five in all.

Q. Will you tell the Court what you saw on that occasion with reference to what was being exhibited on the screen the day you viewed the movie?

A. Yes. The movie was entitled "Viva Maria!" with two leading female stars, an actress by the name of Moreau [fol. 95] and an actress by the name of Brigitte Bardot. The movie was set in a Central American locale. The leading actress portrayed by Brigitte Bardot was a revolutionary type person of Irish descent who worked with her father in harassing the English. In one of the opening scenes she is shown aiding her father blowing up a bridge. He is apprehended by the authorities and shot. She continues with her job to demolish the bridge, which she does. At this point she apparently is orphaned. She is a young woman at the time somewhere around twenty or early twenties. In her wanderings she comes upon a circus or carnival like troop which she joins and gains employ as a dancer, singer, with the other lead actress, who makes her entrance at this point in the movie, Miss Moreau. Through circumstance and a lack of knowledge with the way Miss Moreau has been acting in her act, she comes on stage and initially through accident part of her costume is ripped, torn off. Then it gains some audience reaction and she is encouraged by Miss Moreau to continue with it intentionally, as Miss Moreau begins to imitate her. They continue to take off their costumes until they are down to some undergarments of a nature which I don't know how to describe, except their bodies were still covered or at least most of their bodies were, although it did show quite a bit of the bust of Miss Bardot. This accidental act or the act which begins accidentally then is developed into a regular routine. The movie traces this carnival troop's wanderings over the countryside. In one particular scene [fol. 96] Miss Bardot, who has been occupied with her father's revolutionary tactics, apparently has had not much

time for relationships with men. Miss Moreau indicates that she has had relations with men and love, as the word is used, is very desirable and wonderful. In a particular scene they are having some sort of party or eating in an out of doors atmosphere when Miss Bardot is introduced to liquor and then she upon reflection of Miss Moreau's feelings and attitude toward love, she is followed by three men whom she accepts their invitation to join them in a sort of horse drawn carriage and you see her reflecting on Miss Moreau's words and advice. Then you see her climbing into this cab with these three men. The next scene shows a morning scene at the site of where the carnival has camped and Miss Moreau is a little bit apprehensive that Miss Bardot has not shown up. Almost immediately Miss Bardot comes on the scene with her clothes, outer clothes torn off the upper part of her body, and ripped. She gets out of what apparently is the same horse drawn carriage and she kisses each man, the same men she had joined the night before. She is bruised, her hair is disheveled, and as I said, her clothes were torn in different parts off the upper part of her body revealing undergarments. She kisses each of these men goodby and rejoins Miss Moreau, with whom she lives in a sort of circus troop kind of wagon. She comes into the wagon and she admits that love indeed is wonderful and relaxes in the chair, throws her legs up on a table in front of her and [fol. 97] gives the portrayal of a person who has made a wonderful discovery and looks very fulfilled. The circus troop eventually engages in a full scale or partial scale, rather, revolution in this Central American locale. They join this and throughout the course of the movie in the various situations in which the circus or carnival troop appeared, Miss Bardot is seen writing the names of people who apparently she has made love to, made love with, and apparently slept with, and she writes them on the side of the wagon, on the inside. By the time that they have engaged this revolution, she has quite a list going. In the course of the revolution the circus troop is captured and

they are put in a dungeon like, dungeon appearing jail. Once in there they are separated from a male actor who apparently is one of the leads in the movie; he represents the revolutionary leader. When he appears in the movie, however, he is already captured by the forces who are against the revolution. He is being led with his arms in a sort of stock like apparatus which renders his hands and arms useless although he can still walk. When they are put in this jail the revolutionary leader is separated from the carnival troop by some iron bars. Miss Moreau at this point shows and evidences what appears to be a great attraction to this revolutionary leader. She rattles the bars that separate her from him and the circus strong man accommodates her by separating the bars enough so that she can pass through and he then puts the bars back [fol. 98] in their original order. She comes up to the revolutionary leader and puts her arms around him, around his neck, then in course takes his shirt, rips it from his body. Then you see from the camera location from the back of Miss Moreau, see her hands go up to her shoulders and you see her clothes being parted and the sound of a ripping and she stands there and embraces him. She caresses his body by beginning up in the area of his neck and face and runs her hands down his body and then again stands up and embraces him. Eventually the circus troop is liberated from this jail and they pursue this revolution in the open fields and eventually they overcome their antagonists. In the last or one of the last scenes of the movie, again Miss Bardot is shown running to a man, or not running but at least with a man, and then by the next scene she is seen again indicating writing his name on the inside of the circus wagon, I believe, indicating again consistent with the pattern which began near the beginning of the movie that she evidently had also made love or otherwise slept with this man also. I think this represents a resume or some sort.

Q. Do you recall any members of the clergy being involved in any of this movie?

A. Yes, I do. Apparently the clergy were of at least general Catholic fellowship or denomination. They represented sort of the ecclesiastical authority, and at one point the ecclesiastical authority takes the reins of leader-
[fol. 99] ship from the military authority. The older man, who appears to be a monk of some order, along with a younger man gained access, they stopped the train which had the carnival troop with the lead actresses on it. They gain access to the train and ask for a confidential, private interview with these two actresses who have assumed by this time leadership of the revolution. Once having gained this privacy, they pull guns, take out guns and threaten them and disconnect certain cars from the train, leaving the engine and the car on which the lead actresses are riding with these monks to proceed on. The younger clergyman is shown with his hands around the neck of apparently one of the trainmen or revolutionaries. When they are brought to the headquarters they undergo some questioning, but when neither of the two actresses yields to the questioning, they take them down to a dungeon like scene where various apparatuses of torture are shown. An attempt is made to utilize these various apparatuses in an effort to make the women tell what they know about the revolutionary plans and particularly to sign confessions rejecting their role in this revolution and they refuse to do this. I think as a matter of fact this is the primary intent, to get them to sign confessions of their part in this so they may in turn demoralize the revolutionary followers. The monks, the two I mentioned originally along with others, are seen placing the women in these various apparatuses, one which shows some sort of clamp that a person's head is placed in, with the intent, of course, of
[fol. 100] screwing this clamp upon the person's head. These various apparatuses are never utilized to the point of pain or torture because the revolutionaries break through. They interrupt this scene and apparently therefore the heroines are spared this torture. The clergy are shown in this way in the movie.

Q. Subsequent to this filming of this movie for the purpose of bidding the board to arrive and determine a classification, did the board have a subsequent meeting and discuss the movie?

A. Yes, they did.

Q. The full board?

A. Yes.

Q. Did the board generally have a lengthy discussion on what proper type of classification which in the judgment of the board should be given this movie?

A. Yes, I think it was fairly lengthy. I don't believe it was as long as some but longer than the vast majority.

Q. And the board arrived at the determination that it should be classified as not suitable for young persons?

A. Yes, they did.

Q. Now, in your work as a pastor, do you have occasion to work with young people, both boys and girls, under the age of sixteen years?

A. Yes, I do.

Q. You have counseled with them as they come to you for counsel and guidance?

A. Yes, they do.

[fol. 101] Q. You have counseled with them as they come to you for counsel and guidance?

A. Yes, they do.

Q. And do they discuss their problems with you?

A. Yes, they do.

Mr. Hartt: If the Court please, he is again leading the witness. We object to it.

The Court: I will overrule it.

Q. And in your opinion would this type of movie viewed as a whole have any detrimental effect whatsoever on young people below the age of sixteen years?

Mr. Hartt: If the Court please, that is not the standard of the ordinance.

The Court: I will let him answer.

Mr. Hartt: "Detrimental" is not a test for the classification of pictures at all and we object to it.

The Court: I will overrule it.
Mr. Hartt: Note our exception.

A. Yes, I do believe it would be.
Q. Why?
A. In this sense, that it shows no explicit scenes of sexual intercourse as such but it does imply very clearly that such does occur. I think it does show this, and that the detrimental effect is to show that sexual expression between a man and a woman or any two people of the opposite sex is something that can be entered into without responsibility and continuing commitment, that it equates [fol. 102] sexual feeling and expression with the word "love," that—

Mr. Hartt: If the Court please, if he would slow down, I'd like to note it.
The Court: Sir?
Mr. Hartt: If he would slow down I'd appreciate it so we can make some notes on this.
The Court: Well, I can't control his modulation. Proceed, Reverend.

A. The scenes of the relationship between Miss Bardot and various men in the movie, as well as between Miss Moreau and at least one man in the movie, indicates that the attraction between the man and the woman is something which is to be fulfilled almost upon first meeting; that there is no evidence of true affection and continuing responsibility between the people. It implies that people can meet, see each other, and immediately, without too much other duration of time or of exchange of personal responsibility and commitment, can enjoy each other sexually, part, and therefore no harm. As a matter of fact, this is all a matter of one of the joys of life and is great, is magnificent, is wonderful, as such, and I think this type of relationship is not true and that it is misleading and shows it as acceptable and approved behavior.
Q. In your judgment, what this picture portrays is directly contrary to our accepted moral standards?
A. Yes, it is.

[fol. 103] Q. I believe the gist of your testimony then with reference to this then is it does portray sexual promiscuity in such a manner which is likely to encourage juvenile delinquency?

Mr. Hartt: We object to leading and putting words in the witness' mouth.

The Court: I will let him—

Mr. Hartt: He is fixing to read from the ordinance. He can tell his opinion about what it is without being read.

The Court: Overrule it.

Mr. MacMaster: He was objecting because we weren't following the ordinance a while ago.

Q. Encourage juvenile delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest?

A. Yes, I think this movie would lead to their sexual promiscuity, that it could.

Q. Then in your judgment this violates this standard set in the ordinance I have just read?

A. Yes, I do.

Mr. MacMaster: Okay.

Mr. Hartt: If the Court please, cross examination will be of some time. I would like to know the Court's pleasure on proceeding now. It is about twelve.

The Court: Well, we will recess until one-thirty.

(Court was in recess, after which time the following proceedings were had:)

[fol. 104] Cross examination.

By Mr. Hartt:

Q. Reverend Maceo, for the record we call you reverend. How do we address you properly?

A. That is fine.

Q. I believe you described this scene where the so-called striptease took place as concluding where both the young

ladies still had their bodies adequately covered, is that correct?

A. I used the expression, I believe, that most of their body was covered.

Q. Well, so we understand, you are not saying that so-called scene was indecent at all, are you?

A. I would say it was questionable.

Q. What?

A. Questionable.

Q. Questionable. The time of this picture would be approximately what? 1910? For reference purposes, they did have an automobile in it but otherwise it was a very old automobile, was it not?

A. I believe so.

Q. Shall we say somewhere around 1910, is that correct?

A. I am not sure.

Q. All right. Would it also be fair to conclude that in this "striptease," that these young ladies had on what we would call the number of undergarments that would be customary in those years? In other words, in a word, they took off more petticoats than you could count.

A. They took off quite a number of petticoats.

[fol. 105] Q. And they still had some on when they quit, didn't they?

A. I believe in the initial scene, the one which I spoke to regarding the first time Miss Bardot got on the stage and ran into some accidents which they proceeded to exploit and carry on,—

Q. In other words, her outer dress tore somewhat and they started tearing off the outer dress, but when they left the stage they still had on substantially more clothing than you would find in a bikini bathing suit or something like that?

A. Yes.

Q. There was some discussion regarding this scene in the jail where the strong man had pulled the bars apart, but the man, the revolutionary leader, whatever his name was, he was in there with his arms chained above his head

to a large block of wood that could be described as a yoke, is that not correct?

A. Yes.

Q. In other words, he never got his hands at all on the young lady, did he?

A. Not that I remember seeing.

Q. This block of wood would be as big as a railroad tie or perhaps even bigger, is that correct?

A. Not quite as big as a railroad tie, as I remember it.

Q. But substantially bigger than a four by four though?

A. Yes.

Q. And the only thing that was shown there, really, was [fol. 106] the girl taking off his shirt, loosened his shirt, and then I believe you said that she was, as the camera faced out, she was loosening her blouse or something, is that correct?

A. She had torn her clothes, all the clothes from her upper body.

Q. Well now, was she nude from the waist up or not? Did you actually say she was?

A. From the way the camera depicted it, you could see her clothes from the back split down what apparently was the middle seam in the back and it came almost off the edge of her shoulders, as I recall.

Q. Came off the edge of her shoulders. My question was, could you say that you actually saw her nude from the waist up?

A. I can only say what I just described.

Q. All right. Therefore, the front of the dress was still on as shown right there, wasn't it?

A. It was—The camera angle was from here back, so as to what the front actually was, the state of the actual front of her dress was, there is no way of telling.

Q. It would be judged by inference or imagination, is that not true?

A. Yes.

Q. Had you imagined it was torn off?

A. I had imagined, yes.

Q. Regarding this wagon in which these girls traveled, the names of some boys were written in there, I believe you testified, or men?

[fol. 107] A. Yes.

Q. And you did not see the Maria played by Brigitte Bardot have sexual intercourse with any man at all, did you?

A. No.

Q. As a matter of fact, you did not see them in any situation where they were undressing each other, did you?

A. I don't remember. I do not believe so.

Q. Now, the only thing that we have so far as this list of names on the wall,— Would there be as many, would you say, as five or six or seven?

A. Yes, I would say there was between six and nine.

Q. All right. Say nine. Of those nine names you never saw her have intercourse with any one of them, did you?

A. No.

Q. And it was only again in your imagination that they were so represented as having intercourse with her, is that correct?

A. That is correct.

Q. All right. Regarding your background, please, sir, in the matter of education, I presume that you finished high school, college and a seminary of some sort. Tell us what that educational background was.

A. Just that. Public high school at Fort Worth.

Q. Where? Fort Worth?

A. Fort Worth, Texas.

Q. Where did you go to college?

A. S.M.U., received a Bachelor of Arts; Bachelor of Theology from the Philadelphia Divinity School in Philadelphia, [fol. 108] Pennsylvania.

Q. When did you receive that degree?

A. 1956.

Q. And the Bachelor of Arts at S.M.U., what was the major you had there, please, sir?

A. History.

Q. And so far as courses in psychology or psychiatry, have you had any?

A. Yes, I have. I had six hours at S.M.U. and three hours in seminary.

Q. Six hours at S.M.U. Is that in fact a sophomore beginning course in psychology, is that not correct?

A. No, it was a course in abnormal psychology.

Q. And the course, three hours at seminary, was what?

A. It was a course in Freudian psychology.

Q. I see. Then you would be able perhaps to read into these symbols which you found in this picture more things than the average person, wouldn't you, by virtue of this Freudian course in psychology?

A. I think I would be able to give names to them. I think the impressions would be the same.

Q. They do at least identify these various emotions and do give names to them, is that not correct, in that course?

A. They give names to them, yes, sir.

Q. I believe some of my notes here say something to this effect. I believe you said regarding the relationship of love [fol. 109] as depicted in this picture that you found that it was not true, is that not correct, words to that effect?

A. I recall saying that as the dialogue took place, that they referred to love, but that the only evidence in the character portrayal did not fulfill anything but a very transitory meeting, and as such I was left—

Q. Yes. In a word, if we imagine there is a sex relationship, actual intercourse, between this boy or any one of the men and any one of these girls, we can conclude that it took place without their being married, is that not true?

A. Yes, I think so.

Q. And that, of course, would be described by you as a clergyman as what? Adultery?

A. No, fornication.

Q. Fornication. Is there a difference?

A. Yes. Adultery involves one of the parties being married.

Q. And fornication would be what?

A. Sexual intercourse between unmarried people.

Q. So far as we know, no one of the parties here was married, is that correct? Neither of the girls was married, they appeared to be single women?

A. I don't remember any reference to their marital state at all, as far as being married.

Q. As far as the names on the wall, there was no reference to them being married either, was there?

A. No, not that I recall.

[fol. 110] Q. Then we can truthfully say the picture did not depict adultery, can't we?

A. Not that I remember.

Q. And do we correctly infer then that in passing this judgment whether there is a proper or true relationship, you would obviously admit that you carried into this judgment which you made your training both as a young man raised in a Christian home and also your training as a minister, is that not true?

A. In making the judgment, no.

Q. You mean you could divorce yourself from the training which you have and the position which you now have in your church?

A. I think by any other name, the relationship that I inferred that took place on the screen would have been the same.

Q. No, I am not saying that: My question is this, when you said that these relationships are improper, you obviously bring to bear your personal experience in religion as an individual and also the particular experience which you have by virtue of being an ordained minister or preacher in the church, is that not true?

A. The impropriety of it?

Q. Yes, sir.

A. That judgment?

Q. In other words, that judgment is heightened by virtue of the fact you have this position as an ordained minister?

A. Heightened, I would suppose.

[fol. 111] Q. All right.

A. I am not quite sure.

Q. What I am trying to say, there are people who might not be so sensitive to what was shown in that picture by virtue of the fact that they had not had so close an association with a Christian church and particularly that they were not ordained as a minister in the Episcopal Church, is that not true?

A. Yes, I think there would be some people like th[illegible].

Q. All right. Now, this picture also had some scenes in there which all the way through were, we might call them merely absurdly ludicrous, is that not true?

A. Ludicrous I'd go along with.

Q. Absurd too, ridiculous?

A. Maybe.

Q. I am thinking, for example, do you recall a scene where this little dove was flying around and someone shot the dove with what appeared to be a big pistol and the man went over and picked up the little bird, pulled the bullet out and gave it back to the man who shot it and the bird flew away?

A. I remember the scene.

Q. We don't construe that as a miracle but a feat of showmanship, is that not true?

A. The character who did this was a magician and it was within the context of his act, right.

Q. Yes. At the same time that same dove on occasion was flying around and when—I guess we'd call them the baddies [fol. 112] —were running a machine gun or something, the little dove carried a hand grenade over and dropped it on the machine gun next, didn't it?

A. Yes.

Q. He did that twice, didn't he?

A. Yes.

Q. Would that be fairly described as sort of ridiculous or contrary to human experience?

A. Yes, I would describe it as contrary to human experience.

Q. We also found a scene where the revolution was going pretty good and someone was barricaded in front of the bank; a grenade was thrown or some explosive and when it blew up, it blew up the sandbags, is that correct? Do you remember that? And the sandbags were not sandbags at all; they were money bags and gold just rained all over the town square, is that correct?

A. I remember the raining of the money, the gold coins, all over the square, right.

Q. Again not comporting with human experience, is it?

A. Not mine.

Q. And as a matter of fact all through this thing was quite a bit of that kind of conduct, is that not true?

A. I would have to really enumerate—

Q. Well, do we need to call some more off? Then let's call some more. All the items of the torture chamber really were again in such bad repair that they didn't work, isn't that true?

[fol. 113] A. Yes.

Q. I mean, the tongs came apart and the pin fell out, and the screw that was going to crush the skull, the vise fell apart and the vise screw came loose and the whole thing collapsed, is that not true?

A. Yes, I believe I remember that.

Q. Now, this torture situation there, that wasn't a real torture scene at all, was it?

A. No one was tortured in actuality.

Q. As a matter of fact, you would say it was not a real torture scene, wouldn't you?

A. Yes, I would.

Q. Now, the clergy in this particular picture, did you understand them to be Catholic?

A. I inferred that they were Roman Catholic priests.

Q. No one said they were?

A. No.

Q. Being in Mexico at the time in question, you probably would make that inference, is that correct?

A. I believe I did.

Q. In other words, you did. Now, the one who was the monk who was head of the monastery group or something, he had rather a phenomenal experience happen to him too.

A. Yes, he did.

Q. Tell the Court what that was.

A. I have forgotten the exact context but in some way an [fol. 114] explosive was dropped in his cowl draped over the back of his neck. He walked off camera; you hear an explosion; the next scene he is walking down the steps with his head in his hands.

Q. But that is not a new idea either, is it?

A. The head in the hands?

Q. Well, don't you recall an old story from childhood, the headless horseman and Ichabod Crane, carrying the head in the hand, a childhood story?

A. I believe I remember that.

Q. So the idea was not new?

A. No.

Q. And again that was something that was a spoof in itself, wasn't it?

A. Yes, it was.

Q. Well, that was about the last part of the picture. The birds were along toward the latter part, and the torture chamber. Let's pick up at the beginning of the picture. The little girl running around at the very beginning of the picture, that was something of a spoof too, wasn't it? Remember that?

A. Yes.

Q. There was a little tad, we will say, about six or seven years old, wasn't she?

A. I'd say somewhere between seven and nine.

Q. Seven to nine. I yield. And she was out there apparently chasing a ball of knitting string when you first saw her, wasn't that true?

[fol. 115] A. Yes, I remember that scene.

Q. Out in the woods, and she ran clear across the panorama of the screen there and suddenly she came behind the hedge and there was a man who appeared there about to catch her for a moment, didn't he?

A. There was a man there, yes.

Q. And when she got behind the hedge, instead of being a knitting string, this was some sort of high velocity fuse and he lit a match to it and it blew up the building, didn't it?

A. Yes.

Q. That doesn't comport with human experience either, does it?

A. In what way?

Q. To have little girls nine years old chasing around with fuses they have personally set, apparently, and blow up a building. That is somewhat unusual, isn't it?

A. In my experience, it is, yes. In my experience it is.

Q. And we could infer generally unusual too, isn't it?

A. This is something I know little about.

Q. Yes, sir. Well, that was an unusual thing at the beginning, the end and the middle. Isn't it fair to say this whole picture was pretty well filled with things that did not comport with human experience?

A. There were many such things.

Q. In a word, most of them were designed to be funny, weren't they, to the audience?

A. I think there were many things in there of a rather [fol. 116] tragic nature which were portrayed to elicit laughter.

Q. Well, much comedy, of course, has tragedy closely involved with it?

A. Yes.

Q. Isn't it true to say that this picture generally was a comedy?

A. Generally, yes.

Mr. Hartt: All right. Thank you, Your Honor.

Cross examination.

By Mr. McElroy:

Q. Reverend Maceo, as I understand your testimony, you are saying that, having screened the picture, in your judgment it was such as to create the impression on young persons that promiscuity—I can't ever pronounce the word but you know what I mean—is acceptable, is that correct?

A. Yes, I think it had this influence.

Q. Now, what age young person do you feel would be subject to this impression?

A. I think the youngsters who are about the age of sixteen, fifteen, fourteen, in that area, would have experienced the onslaught of puberty and adolescence and having these energies and drives develop in them, their being aware of them, their being subject to various stimuli to them, would be subject to some of the scenes in this movie.

Q. How about a nine year old?

A. The nine year olds of my experience probably would not know, be able to infer what a person aware of his own personal sexuality and appetite would be aware of.

[fol. 117] Q. So it is safe to say from that, that from nine down this feature, as you see it, is not going to create this impression on a nine and younger person?

A. I think it is relatively safe to say that, yes.

Q. Now, you mentioned, as I understood you, the fifteen and sixteen year old. How about the eighteen year old? In your opinion is this picture likely to create the impression on an eighteen year old that sexual promiscuity is acceptable?

Mr. MacMaster: If Your Honor please, the ordinance limits it to sixteen and I think the question is irrelevant as far as this ordinance is concerned.

The Court: I will let him answer.

A. I think it might, yes, sir.

Q. Would you draw an age limit at which in your opinion the picture, "Viva Maria!" would not have that danger?

A. The picture itself, I think the picture itself would give this impression to any person of any age.

Q. Even the nine year old?

A. Within the terms of my previous qualifications, a person aware of sexuality in a personal way.

Q. I judge then from that that after viewing "Viva Maria!" you felt that it had created the impression on you that sexual promiscuity was acceptable?

A. I got this impression from the movie, that the movie was suggesting this.

Q. Now, we have talked a little of these bombing scenes [fol. 118] like the little girl and the twine, and the next scene the little girl is delivering apples which explode. Remember, it blows up a building?

A. Is this the one at the police station?

Q. Yes.

A. Yes, I remember this. She takes some basket in there.

Q. And the building explodes?

A. The next thing you see is the building exploding.

Q. And we blow up some bridges before her father is finally shot? Do you think this is going to create the impression on a fifteen or sixteen year old that blowing up bridges is acceptable or desirable?

A. In our community, I don't think so.

Q. And what do you mean "our community"?

A. The City of Dallas.

Q. And when you and the other board members were discussing "Viva Maria!" and speaking in terms of the contemporary standards of the community, you and the board members were speaking of the Dallas community, were you not?

A. I was, and as far as our discussion goes, it was in terms of the teenagers or young people we know.

Q. And if I were to ask you what the community was that you were considering in the context of the ordinance, you would say you were considering the Dallas community?

A. That is my experience.

Q. And that is the only community you were considering?
[fol. 119] A. Yes.

Q. Now, the clergy in this particular picture came out, as the expression goes, they were the ones in the black hats, is that not right?

A. Yes.

Q. They were the baddies?

A. Yes.

Q. Now, someone viewing that picture, do you think it would create the impression on a ten or twelve year old boy or girl that the clergy was bad and evil?

A. Perhaps. I felt it was a mockery. They were bad but they were something to be laughed at.

Q. The clergy were something to be laughed at?

A. There was this mixture in there in which it was hard to determine.

Q. And that was equally true of the bombings, it was a mockery?

A. I didn't get that feeling because there was no sympathy created. I felt no sympathy before going to the movie for oppressors of the poor; I feel no empathy for this characterization. On the other hand, the presumed empathy for the clergy was there, and so I think of the two things, mockery doesn't come to my mind as a word with reference to the other situation.

Q. Now, as I understand, there was some discussion or some feeling amongst the board in their deliberations of "Viva Maria!" that it was sacrilegious. Do you recall any such discussion?

[fol. 120] A. I recall hearing that word, yes.

Q. And the sacrilegious aspect of it entered into it as far as the board's discussions were concerned?

A. I don't remember.

Q. Do you consider in your opinion the picture to have been sacrilegious?

A. I think my witness would have to be in terms of what I have already made because it is so broad an understanding of what sacrilege is as such. The word mockery is the

one I used and one which I feel represents my impression of it. Sacrilegious, I am hard pressed to say.

Q. From your experience in the ministry, are you of the opinion that the subject of premarital sex should never be shown to persons under the age of sixteen years?

A. Never be shown?

Q. Yes.

A. I think it depends on the light in which it is shown.

Q. In which light might it be shown which in your opinion would not create an impression on a twelve or ten year old or thirteen year old that it would be acceptable? The question is poorly phrased. What I really mean to ask is this, in what fashion might the subject be shown to a child of twelve years old that in your opinion would not be objectionable?

Mr. Bickley: If it please the Court, we object to this—

The Court: I believe it is hypothetical, Counselor. Sustain it. We are discussing the ordinance here.

[fol. 121] Q. Are you familiar with the fact that— Excuse me. Your Honor, rather than going into it with this witness, I would like merely to request the stipulation of the City to the fact that there are any number of theatres, both conventional and drive-in, within the immediate area of the City of Dallas which are not subject to the restrictions of this ordinance.

Mr. Bickley: If it please the Court, we will stipulate without admitting that it has any relevance that those outside the city limits of the City of Dallas are not covered by this ordinance of the City of Dallas itself.

Mr. McElroy: And one further thing, if you will, Mr. Bickley, that those theatres are all around the City of Dallas.

Mr. Bickley: Yes, I think the Court may take knowledge of the fact that they are in the very close vicinity and probably on all sides.

Mr. McElroy: We have no further questions of this witness.

Redirect examination.

By Mr. MacMaster:

Q. Reverend Maceo, just one more question. Is it your opinion that the harmful effects of this movie, "Viva Maria!" viewed as a whole, outweigh its artistic or educational values that it may have on young people under the age of sixteen?

A. That is my opinion.

Mr. MacMaster: That is all.

The Court: Stand aside.

[fol. 122] FRANK MARTIN, after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Bickley:

Q. Will you state your name, please, sir?

A. Frank Martin.

Q. And by whom are you employed, Mr. Martin?

A. City of Dallas Police Department.

Q. What is your classification?

A. Captain in charge of juvenile bureau.

Q. With the police department?

A. Right.

Q. How long have you been so employed?

A. With the bureau about twelve years.

Q. And previous to that?

A. I have been in the police department thirty-two.

Q. All right. What is your major duty in your present capacity?

A. Well, it is handling all juvenile offenders that are picked up by the, well, the entire police department. We handle them all.

Q. All right. In the handling of these juvenile offenders, do you have some, do you have any dealings with those who are involved in sex deviations or things dealing with fornication or any such thing as this?

A. Yes, sir.

Q. Do these create a problem insofar as the City is concerned?

[fol. 123] A. I would think so, yes.

Q. All right. Would you elucidate, please, sir, in what manner do they create a problem?

A. Well, of course, the only way— Just the numbers we handle. We handle—I can't give you the exact number; I can give you about what we have handled in the past year or so,—about three hundred fifty just for sex offenses or morals, and sixteen for rape, and a number of others for—

Mr. Hartt: Excuse me, I didn't hear; I could not hear.

Mr. Bickley: He says sixteen for rape and a number of others.

Q. Now, Captain Martin, in handling those, does it take personnel to do it?

A. Yes, sir, it does.

Q. Is there expense involved in doing it?

A. Well, I would think it is quite a bit of expense, yes, all the way through it.

Q. Then after your department handles them, are they sometimes handed over to other departments to continue working with them in some respect?

A. Yes, we refer them to the county juvenile probation officer, which is an arm of the Court.

Q. And then after you do that, then do you have anything further to do with them?

A. Not unless we have to go to court and testify.

Q. Are some of these young people who are involved in [fol. 124] these morals charges or involved in moral situations like that, are they also truants from school at times?

A. A lot of them are, yes.

Q. Do you have any contact with the school authorities in connection with them?

A. Well, not directly, no. In other words, if we pick one up for truancy, we pass this information on to the school administration, or if we pick one up for a sex offense while they are truant, we pass that on.

Q. In your experience do you find that there is ever any future necessity of handling these same types of individuals? In other words, do they have any recurrent offenses?

A. Yes, a lot of them do.

Q. Do any of them ever get involved in other types of situations involving misdemeanors or felonies or that sort of thing?

A. Yes, a lot of them, it is just one arrest after another. It is just a constant repeater.

Q. Captain Martin, is the problem concerning morals charges with juveniles decreasing or increasing in the City of Dallas?

A. I'd say it is just about stable. It is not much increase, not much decrease.

Q. It has been with us all the time?

A. It stays with us, yes, sir.

Q. You are not testifying as to what causes this, are you?

A. No. I don't know.

Q. But you are testifying that there is a problem here?

[fol. 125] A. Yes, sir.

Mr. Bickley: No further questions.

Mr. Hartt: No questions.

Mr. McElroy: We have no questions, Your Honor.

The Court: Thank you, Captain. You are excused.

(Plaintiff's Exhibits 11, 12 and 13 marked for identification.)

Mr. Hartt: If the Court please, to Exhibit No. 11, this copy, we have no objections. Exhibit No. 12, I presume, is a true copy?

Mr. Bickley: Yes, we got it from the clerk this morning.

Mr. Hartt: All right. No objection to No. 12 being a true copy, but as to what is said in here, we violently object and we say that we believe the phrase is "This does not comport with experience." Specially, there is a finding in this judgment that you can go from the beginning in the trial court and district court of the State of Texas, through all the procedures and get a final judgment in the Supreme Court of Texas in thirty-five days, and that is something that we are not agreeing to the truth of. This is a true copy, but as to the truth of the findings, in that sense we do not agree to them. If he wants to prove that up again, we'd be glad to see it established. The other item you have here is what? Notice of Appeal, Exhibit 13. No objection to Exhibit 13.

(Plaintiff's Exhibits 14 and 15 marked for identification.)

[fol. 126] Mr. Bickley: Your Honor, these items we are referring to, Plaintiff's Exhibits 11 through 15, are the judgment, Findings of Fact and Conclusion of Law, Notice of Appeal, the transmittal from the United States Court of Appeals, and the order of the United States Court of Appeals in the case now pending in the federal court concerning the constitutionality of this statute, this ordinance.

The Court: What is the relevancy of it, Counselor?

Mr. Bickley: The relevancy is simply this, Your Honor: the intervenors have come in here and say they have never heard about this thing before. They had opportunity to but they said they haven't, and we think it becomes entirely relevant in this Court.

The Court: On notice?

Mr. Bickley: Not only on notice but also on the finding that has been made by the federal court and the fact it is now pending before the federal court and they have held it to be constitutional.

The Court: I mean what they held, small as this may be here in comparison, that wouldn't be binding here, would it, unless it is finally adjudicated? I mean, a case on appeal,

nobody has got any chains on it. They can knock hell out of you in state court and abrogate it.

Mr. Bickley: This may be so, Your Honor.

The Court: I mean, until they finally act, I mean, you have chosen this. I will let you introduce it for whatever [fol. 127] purpose you can.

Mr. Bickley: I think it ought to be in the record so the upper court, if necessary, will have it.

The Court: I am uncertain as to what you mean to say about the binding phase of it.

Mr. McElroy: Your Honor, the intervenor objects to the introduction of Plaintiff's Exhibits 11 through 15, inclusive, on the grounds there are no pleadings to support the introduction of such evidence, and for the further reason that they are wholly immaterial to any issue in this case, the findings of a lower, inferior, federal court not being binding on this court, and for the further reason, of course, the case is on appeal.

The Court: I don't know whether they are inferior to me. I overrule it.

Mr. Bickley: Your Honor, subject to the Court's viewing the movie as such, we will rest at this time.

The Court: What says the defendants?

Mr. Hartt: If the Court please, if they haven't rested, of course, they haven't. Until they rest their case, we have nothing to offer. We do have a motion, however, that would be in order now, and that would be to strike the testimony of Reverend Maceo because he admitted here in detail that he used a contemporary community standard of the City of Dallas.

(Argument made by Mr. Hartt in support of his motion.)

[fol. 128]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Well, what do you gentlemen do now? Has the plaintiff rested?

Mr. Bickley: Plaintiff has rested subject to the Court viewing the movie, Your Honor.

Mr. McElroy: Your Honor, the intervenor has an exhibit which it would like to offer in evidence at this time.

The Court: All right, sir.

(Intervenor's Exhibit 1 marked for identification.)

Mr. McElroy: Your Honor, we offer in evidence Intervenor's Exhibit 1 which is the written contract between intervenor, United Artists Corporation, and the defendant, Interstate Circuit, with respect to the exhibition of "Viva Maria!" at the Esquire Theatre. The contract on its face shows that United Artists is to participate in the gross receipts of the exhibition of "Viva Maria!" at the Esquire Theatre on a sliding scale, ranging from twenty-five per cent of the gross receipts of the exhibition up to sixty per cent of the gross receipts of the exhibition, depending on the results of the performance.

The Court: What is this for? To show your interest?

Mr. McElroy: To show our interest merely, Your Honor.

The Court: Proceed.

Mr. McElroy: The intervenor has no further testimony at this point.

The Court: How do you propose to get the picture here?

Mr. Bickley: If it please the Court, I don't know what [fol. 129] the Court's desire in this respect is.

The Court: I don't have any particularly.

Mr. Bickley: Beg pardon?

The Court: I don't know that I have any desire particularly.

Mr. Bickley: I would submit to the Court that since there is no jury involved, that this picture can be viewed by the Court without any inconvenience to any parties if the Court would desire to do it in that manner.

The Court: Well, you have got to get it in the record some way so another court can look at it, if necessary.

Mr. Bickley: Yes, Your Honor. They said, as I understand it, they will have the print available when another court desires to see it, but they don't want to carry it with the record all the time.

The Court: I can appreciate that.

Mr. Bickley: It would be impossible for us to carry it with the record all the time. I assume the producer of this film has copies of it and when the upper courts want to look at it, they can bring it in for the upper courts to see, is that correct?

Mr. McElroy: That would surely be my understanding.

The Court: Shouldn't you, if you want to get it, get out a subpoena?

Mr. Bickley: Yes, sir. As I told the Court this morning, if the Court desired to have it over here at the courthouse, [fol. 130] we would get out subpoenas for the machines, for the movie and for the projectionist.

The Court: How are you going to show it?

Mr. Bickley: To present themselves here at the courthouse and show it at that time.

The Court: How are you going to get them here?

Mr. Bickley: By subpoena.

The Court: Have it here early in the morning, at nine, not later.

Mr. Bickley: Nine o'clock in the morning. Yes, sir.

Mr. Hartt: If the Court please, could the Court instruct the subpoena for nine o'clock Monday morning?

The Court: No, it has to be in the morning. I am going to rule and dispose of this before Monday morning.

Mr. Hartt: We have some question regarding the subpoena when we see it. I can anticipate we will have an objection to the confiscation of the machine. It is nearly this high and weighs nearly a thousand pounds, and we want to be heard on that at some time. I'd like to see the subpoena and the motion, if I could do that.

Mr. Bickley: We will get out the subpoena in a few minutes, Your Honor. This is the reason that we suggest to the Court that it would be easier for counsel and the Court to view it at the regular viewing places, and there are several of them available in town, many of them, where the machines are set up and where the picture is available [fol. 131] and this sort of thing. These are harder than the ordinary sixteen millimeter films to show. They require a lot more personnel; they require a lot more skill and a lot more equipment.

Mr. Hartt: If the Court please, we are not in a position to agree to that at all, but when the subpoena is served—We have a short brief on that.

The Court: Let's see that brief. I am sort of inclined to agree with what you said this morning. I doubt if, in the absence of an agreement, I don't imagine a judge could go forth and view a picture. I remember a case once where down in Athens the judge went out in his boots and got in a row boat and looked over an overflow, but it was done by agreement. I don't think the case was ever appealed. If it was, it wasn't on that point. So if you want to get it here, you have got to get out a subpoena, haven't you?

Mr. Bickley: Yes, sir, I assume we will have to get out a subpoena, Your Honor, and we will get it out against both parties to make sure we have it.

The Court: How are you going to get it here?

Mr. Bickley: That will be up to them, to get it here, Your Honor. We will get out the subpoena. We assume, since the evidence is in their control, it must be here in the courthouse, it will be their problem to get it into the courthouse.

The Court: Well, get your subpoena out. We will take a fifteen minute recess.

[fol. 132] (Court was in recess, after which time the following proceedings were had:)

Mr. Hartt: If the Court please, during the recess we have been handed a subpoena duces tecum addressed to Mr.

Raymond Willie, Vice-President and General Manager of Interstate. The subpoena in effect asks the following: To bring a current copy of the motion picture entitled "Viva Maria!" As we told the Court this morning, we will produce that tomorrow morning without subpoena; there is no objection to it. It also says, "together with equipment necessary to project the same." Now, at this point we are changing to the argument in controversy. This is very heavy and expensive equipment, difficult to move and which if the City wants to move, they should pay a proper rental for it the same as someone else. Otherwise, to take over that kind of equipment borders on confiscation and violation of our Constitutional rights, and to take over a man's plant for one day, take over a projection machine or something else, it violates the rights there of anybody, and we cannot bring that machine here and we object to it. They can get a machine if they want to, but in trying cases of this type, if they want to get either a heavy machine or a portable, there are places we can refer them to where they can be obtained. But both the expense of conveying them to and from the courtroom and the responsibility of getting them set up and established should be the City's and not upon a party who is a defendant. They also say, "bring [fol. 133] an experienced operator for the machine." We have operators, but again, if they want to hire a technician,— This borders very much upon the situation that exists when a doctor is examined, has examined someone and the other side decides to subpoena him as their witness and not pay him. They may keep an operator here for an hour or a day under their subpoena, that is their privilege. If they want to subpoena the man and make him perform professional services, we will be glad to refer them to the union where these men can be hired. We want to cooperate with them but we do not want to undertake the burden of hiring a man to make out a case for them or to hire their expert witnesses, so we object to the last parts of this subpoena. We will voluntarily bring the picture with the subpoena, either with it or without it. At nine o'clock

tomorrow morning we will have the film here and we will be glad to meet with the attorneys and refer them to people who sell these machines or rent them, and also to assist them in locating the union where an operator can be hired. We will be glad to cooperate with them.

Mr. Bickley: I take issue with counsel that he wants to cooperate or he wants to do anything else to help see this film. He has shown by his attitude he does not. He has viewing rooms available; he has machines available, places available where the Court could view it and all he has to do is to agree for the Court to view it in one of those places and this would not be necessary, and since he thinks [fol. 134] it is so inconvenient to him yet he refuses to make it convenient, then we think this is his duty to produce the film, and integral with the film is the equipment to show it because it is of a very technical nature. It is his film; he needs to keep it in his possession that it not be lost and that nothing happen to it, and he needs his own operators to actually show it in order that there is no responsibility on this Court for the losing of that film, there is no responsibility on us for the losing of the film once it is produced into this Court, or for the burning up of the film or for the breaking of the film. It is a matter that he needs to keep within his possession and we say for that reason, because of the very technical nature of it and because by his own brief he shows there is no case in Texas which deals with a judge by himself going out to view the film. He talks about a jury view and a jury certainly we agree with him. In his own brief he says where it is impossible or where it is impracticable to actually bring it into the courtroom, then he thinks that the Court ought to be able to view it at another place, and this being so, we think it applies in this case as soundly as it could in any other.

The Court: How are you going to get it in the record when it is not here, counselor?

Mr. Bickley: Judge, we think this, even if the film is here, the only way it can be put into the record is for that film to be marked and for counsel to agree that either

[fol. 135] this film or a print substantially like it will be available and this will be a burden upon not only the exhibitor but also upon the producer of the film, since they have intervened and they have become parties in this suit, and that same film can be marked there as well as it can be marked here for that purpose, and if counsel would agree to have such available, we would not make any objection to it as not being an exact print at the time it was actually shown. We have always been willing to agree with counsel on these things.

The Court: You agree it is not what, now?

Mr. Bickley: We would not raise any question about it not being an exact duplicate or print if shown at a later time from a different print of the same film. Now, this same film—

The Court: I don't quite understand you. I thought certainly the same film, wherever shown, would be shown, wouldn't it? You are relying upon a picture film.

Mr. Bickley: However, Your Honor, there are many other films that are exact duplicates of this.

The Court: I see what you mean, yes, sir.

Mr. Bickley: We would not require or insist that that exact print be shown.

The Court: You mean the same reproduction but not the same print.

Mr. Bickley: That is exactly right, Your Honor, because otherwise it would tie up their film until this thing [fol. 136] was finally heard by the Supreme Court of the United States, and when we know not.

The Court: Are you taking the position you can make him lug it up here and furnish all of the experts and do whatever is necessary to show it at his expense, his cost?

Mr. Bickley: Yes, sir, we think we can. We think that the film is no good without the equipment that goes with it and we think that this is his burden because he holds it within his hand to keep from going to that expense, if he wants to. Now, if there is a charge connected with showing it at his place where his facilities are available and

this is a proper charge to us and the Court wants to put it as a charge to this case, we certainly do not object to it. We don't object to actually paying it, if necessary, but we think that this is a thing that is a matter of convenience to the Court; we think the Court can require it; we think that counsel can do it; we know that counsel can if they so desire.

The Court: Are you claiming the judge of a court can go out and look at it away from the courthouse?

Mr. Bickley: We think you can, yes, sir.

The Court: There is a case in 181 2d where he couldn't go out and look at a fence.

Mr. Bickley: Your Honor, I don't know of any case—

The Court: And there is another case about going out and interviewing a child.

Mr. Bickley: Where the Court itself, where it is being [fol. 137] tried before the Court, and this may be such a case, I don't know, I am not familiar with that particular case, we have not briefed this particular point, and that being the case, if the Court is of the opinion it can't do it at all, then we will insist on our subpoena being good.

Mr. Hartt: If the Court please, the problem here is focused in this case, but it underlies what amounts to a major policy decision by the City of Dallas, and that is the taking of property without due process of law. Now, the Constitution prohibits that. If the City of Dallas sees fit to go into the business of exhibiting and screening motion pictures for their own groups, they have the problem of getting the equipment mechanically to project it and someone skilled enough to operate the machine. We pointed this out informally in the past, but in this case here and the others, we come to the question of a pattern. There will be a truck expense and labor to bring them here and take them back, and the use of a machine for a day is something which will tie up equipment. Now, that is condemning property or taking property for the use of the City, because the City has the burden of making this case and not the exhibitor. The Friedman case squarely

places the burden or sustaining the judgment on the City, the sustaining of the judgment of this classification board, the ordinance does. It is the City's burden and not ours. Being the City's burden, we have the problem— In the Interstate case, Interstate is a big exhibitor. There [fol. 138] are small exhibitors also who will be confronted with the same problem. As a matter of policy when it starts to taking property without due process, it places on these people to bring down here so the City can sue them, to bring a machine; that is something new in the law to me. I may represent a poor workman or, to us, a great corporation, but to make him produce a large milling machine or factory to make it an exbhiit is something unknown to me. I believe it is unknown to the law. Now, if I want a model, if I want a mock-up, if I want an exhibit, if I need special people to present my case, that is my burden. But the burden of exhibiting this film and showing it to the Court being the City's, the City does not have the right to use subpoena process to then require us to tie up our machines and equipment for the benefit of the City of Dallas without just compensation. Now, tomorrow—this Court is already aware of its docket,—there is another case coming here of this type.

The Court: Tomorrow?

Mr. Hartt: Yes, sir.

The Court: Not this court there is not.

Mr. Hartt: Well, I understood so formerly. In other words, the City of Dallas vs. Rowley United is a motion picture case and the pattern set here is going to be most important. Now, if each of the cases that the City of Dallas sees fit to file as a plaintiff winds itself into a courtroom with the defendant having the obligation of [fol. 139] assisting the plaintiff in proving the plaintiff's case, they speak of cooperation, all we need to do is roll over and play dead and say, "We agree with you." But when you come to an adversary proceeding in the courtroom, we are friendly with the City but we do not like to have property taken.

The Court: How big is the film?

Mr. Hartt: Approximately, I'd say, twenty inches square and probably that thick. They can be brought here easily. The film has a value but the film we are not worrying about, as long as we get it back. Everybody agrees on the film. But the question is, do we have to hire a man—

The Court: Can you take the film out and look at it?

Mr. Hartt: Sure, we can bring it in and let you look at it in the morning.

The Court: Can you unravel it without hurt?

Mr. McElroy: Your Honor, it has to be projected. If the Court means can you hold it up to the light, the answer is no, Your Honor.

The Court: I'd seen old films where you sort of rolled it along.

Mr. McElroy: Not this type of film, Your Honor.

Mr. Bickley: It cannot be done that way, Your Honor. And if we have it do this in this manner and if we have to go to this trouble to subpoena that film in here, then we shall always insist that not any copy of this film but this film itself always be available for any showing that must be made.

[fol. 140] Mr. McElroy: Now, Your Honor, as the Court appreciates, the intervenor has not been making this particular objection. For purposes of the record, because it is going to be very important at some other stage on the Constitutional ground, United Artists would like it known that it feels it to be imperative that the Court screen the picture, I mean view it in its totality; if that can be done here, we have no objection to that. If it can be done anywhere else, we have no objection to it. We do feel that this Court and no other Court subsequently can ever rule on the Constitutional questions unless the picture is viewed. Now, it is unreasonable to say that we are going to bring one of, well, maybe we have twenty-five prints of this picture, and leave it in a courthouse for the next eighteen months at the pleasure of the City of Dallas. We are perfectly agreeable that our film be viewed by the Court and we want the Court to do it.

The Court: Are there available outfits to set it up besides your particular apparatus?

Mr. Hartt: Yes, sir, there are many, Your Honor. The City can get them if they want it. They are trying to dodge the burden of buying a machine and hiring an operator.

The Court: What is the cost of it?

Mr. Hartt: Frankly I never have bought one. I don't thing you could buy one for a thousand dollars; probably it would cost you more than that; I'd say several thousand, perhaps.

[fol. 141] The Court: What does it cost to rent one?

Mr. Hartt: I never rented one in my life. I will find out and tell the Court and the City both.

The Court: Are there those kind of things here in Dallas, set up and ready to go?

Mr. Hartt: They can be rented by the City, I think.

The Court: What do you place as rent on your machine?

Mr. Hartt: I haven't got a rent on the thing at the moment, I am sure, without checking.

Mr. Tobolowsky: The exhibitor does not have a portable projecting machine, Your Honor, that we could bring with the film and show it. That is, the defendant in this case doesn't. I know that there are equipment houses that do.

Mr. Bickley: Is there a portable projection machine in the City of Dallas that you know of?

Mr. Hartt: I think there are some, Alex.

Mr. Bickley: That can be rented and be brought in here? The last time we talked to one of your people, you were sending to Switzerland to get a part for one.

Mr. Tobolowsky: It was my understanding during the recess—because even though you have said to the Court you don't believe we want to cooperate, I want to say to the City and the Court that we do desire to cooperate,—there is a portable that I think could be available, but I don't think it could be available at nine o'clock unless a decision is made fairly quickly. It takes time, even though it is a portable.

[fol. 142] Mr. Hartt: This machine weighs approximately a thousand pounds, I have just been informed.

Mr. Tobolowsky: You mean even a portable? I was told it was seven to eight hundred pounds.

Mr. Hartt: In other words, two of us together could not lift it. It takes a heavy truck and the conveying of it is important, both to and from the Court, but if the City wants to go into this, it is their burden, not ours, to risk our machine coming down here. The operator, we can refer them to the union and they can get a union operator and we will be glad to do that. But we don't want to have the peril of our own machine being transported out here without insurance to cover the machine and subject to condemnation by the City for a day. If the Court will recess us again, we will—

Mr. Tobolowsky: I will make some calls with the City Attorney, Your Honor.

The Court: Can't you conceive of some equity in what they say?

Mr. Bickley: Yes, I think there is some equity in what they say. I think the equity would be simply this, that they would agree to show it where they already have facilities available. This, I think, would be equity. But be that as it may, they don't choose to do this. Since they don't, we will do it another way. But as I point out to the Court at this time, we intend to mark this film and we shall always insist that this film be available. I think that is our right. [fol. 143] Mr. Tobolowsky: Your Honor, the defendant does not own the film; we only have it under a license agreement, which is in evidence, and we certainly don't have any ability to mark a film or take any part of it out or what have you without certain sworn affidavits, and it is a copyrighted matter. United Artists would have to speak to that subject.

Mr. Bickley: They are parties to the lawsuit. Further, Your Honor, these machines create a hazard. They create a fire hazard and in bringing them into this building and using them there is a possibility of damaging the floor with a machine this heavy; there is the possibility of fire; there are other possibilities that go with it. I think I am not overstating the case.

Mr. Hartt: If the Court please,—

Mr. Tobolowsky: I am advised only by a nod of the head that you are wrong, Alex.

Mr. Bickley: Is that right? There are others who know more than I do. Is that correct, no fire hazard?

Mr. Hartt: There has been a finding that this entire matter would come to an end in thirty-five days anyhow from last Monday, so it cannot be of too great significance if the picture, perhaps, if one of the intervenor's prints were held for that long.

Mr. McElroy: It would be a matter of extreme inconvenience. We don't have many prints of the picture and they are in use all over the country. This may seem odd to [fol. 144] the Court. There must be fifteen hundred theatres in the United States and I would hazard a guess that we do not have fifty prints of this picture. Now, obviously, our prints serve many theatres and we don't keep them on the shelf. If we kept them on the shelf, as everybody suggests, we'd have them on the shelf right now and we haven't got but one print in the City of Dallas. There will be times when we do not have a print in the City of Dallas; they will be in Houston, Fort Worth, San Antonio, they will be on the West Coast. If Mr. Bickley is serious, which I doubt, in suggesting that the print brought tomorrow is to be marked and retained by the Court, we object to it now and continue the objection from now until it is concluded. I am confident that, one, Mr. Bickley doesn't mean that, and two, the Court wouldn't handle it in that fashion. We have no objection to having a print produced. They can mark it on the can and we will give them a print at some later date that is substantially comparable to it, assuming we have enough advance notice to get it back from Washington or wherever it happens to be at the time.

The Court: Of course, the big item here is the expense of showing it and getting the equipment up to it, and it is not any easy matter. You don't want to yield to the City, I guess, for future cases, and they don't want to go into the motion picture business, having to get the equipment

to show one every time one comes along. Does anybody know what the expense of showing the thing in the court-
[fol. 145] room would be? Looks like your side ought to possibly know.

Mr. Hartt: We could get him the expense for the rental, Your Honor. I presume they contemplated the expense when they undertook the burden of this ordinance.

The Court: I expect they didn't contemplate this because it is something I never heard of.

Mr. McElroy: United Artists has no screening room in the City of Dallas; it has no projection equipment in the City of Dallas. We have to screen our pictures at somebody else's place of business, at Interstate's place of business from time to time.

Mr. Tobolowsky: Your Honor, insofar as what the cost of a projectionist would be, this would be a matter, I think, for the union, projectionists' union, to fix depending upon, I think, the length of time and whatever their rates are. With reference to the exact rental for a machine, if the Court would like to know that information, I think if I could have five minutes, I think I could find out the exact amount, including bringing it down here.

The Court: What would be the cost of an operator?

Mr. Tobolowski: This I don't know. I think this would be union scale, Your Honor.

The Court: There isn't any great secret about operating it, is there. You get it in that machine—

Mr. Tobolowsky: Yes, sir, I think there is, and more particularly with a portable. There probably has to be two
[fol. 146] projection machines rather than one, is that right? It would take either two projectors or you have to stop, and I think that is the way this is geared, for two projectors, and I think it would take an expert, Your Honor.

Mr. Hartt: If the Court please, I have been through this in trial and we found that a bailiff deputy sheriff who could run a small thirty-five millimeter camera did very great damage to a commercial film because he did not have familiarity with it. They would need a certain amount of

technical skill in this operation; they need a union operator. We had film all over the courtroom like a bunch of snakes because the man did not know how to run it. If we can recess now, we will be glad to go back and get the cost of it and line up an operator for them for tomorrow so they can have it.

The Court: That won't establish whether there is equipment here in Dallas, will it?

Mr. Bickley: We will have to do that to establish whether it is even available or not.

Mr. Tobolowsky: I checked on that. Interstate does not own one but I think we can get one available.

Mr. Bickley: Your Honor, we will find out what it costs and advise the Court in a few minutes.

The Court: All right. Do that.

(Court was in recess, after which time the following proceedings were had:)

[fol. 147] Mr. Bickley: Your Honor, we have come to an agreement on this.

(Conference at bench among all attorneys and the Court.)

(Court was in recess until nine o'clock, February 18, at which time the following proceedings were had:)

(Film "Viva Maria!" shown in courtroom.)

Mr. Bickley: If it please the Court, the plaintiff rests their case.

The Court: Does the defendant have any testimony to offer?

Mr. Hartt: I don't anticipate that we would, but before going forward, we have a motion, if the Court please, at this time. We move the Court, considering the law on the subject we have already argued without going into that again, we simply say that this picture certainly is not one to be classified as "Not suitable for young people," and, the Court having made an inspection of the film at this time,

that the plaintiff has not made a case to show that this picture should be restricted or limited in its exhibition to anyone. We believe that finding should be made and I ask the Court at this time to so make it and this matter will be over.

The Court: Well, I will carry it along, if you have any testimony to offer.

Mr. Hartt: There is an intervenor; perhaps he has something to say. Do you have anything?

Mr. McElroy: You have no evidence to offer?

[fol. 148] Mr. Hartt: Well, I would make a motion at the end of plaintiff's case. I don't know whether you want to make a motion too.

Mr. McElroy: The intervenor does have an affidavit it would like to offer in evidence at this time.

The Court: Proceed.

Mr. Hartt: If there is no other motions then, at this time I would tell the Court we have no evidence to offer.

(Intervenor's Exhibit 2 marked for identification.)

Mr. Bickley: If it please the Court, directed to Intervenor's Exhibit No. I-2, I presume it is,—is that the way you have designated it?—we object to its introduction because it is irrelevant and immaterial to any question in this particular case.

The Court: May I see it?

Mr. Bickley: Yes, sir. And for the additional reason, Your Honor, that it also constitutes hearsay.

Mr. Tobolowsky: Your Honor, the print which is the only print of "Viva Maria!" in the City of Dallas is being exhibited at the Esquire Theatre and it was brought down from the Esquire Theatre last night after the performance was over. The theatre opens at twelve-forty-five today. With the consent of the City Attorney, the print is being taken back to the theatre, if that meets with the Court's approval.

The Court: Oh, yes. I understand for future use it will be available.

[fol. 149] Mr. Tobolowsky: A positive print. At this point United Artists could speak to that subject more than the exhibitor, but I understand that a number of positive prints are made and with enough notice I think a print can be obtained.

Mr. McElroy: Your Honor, I think the record ought to be clear, especially as to what United Artists is in a position to agree to. It is expected that the Dallas office of United Artists will have anywhere from fifteen to twenty-five prints of this picture on hand in the State of Texas and Oklahoma to serve some twelve hundred theatres. I cannot assure the Court and don't want to be in a position of assuring the Court that if the film is asked for tomorrow, a print will be available. I can only say if this Court or some other Court gives reasonable notice, we will have a print, but it can't be "tell me today we need it and we will have it tomorrow," because it may be in Houston.

The Court: That ought to serve the purpose. How about that other case?

Mr. Hartt: You mean the other trial case?

The Court: Yes, sir.

Mr. Bickley: The plaintiff is ready to proceed, Your Honor. Do you want me to get through with it and argue both of them?

Mr. Hartt: If the Court please, I think we prefer at this time to conclude this one because we have some different parties here who do not need to stay through the trial.

[fol. 150] The Court: Proceed with the argument.

(Argument was presented by all parties.)

The Court: Oh, I realize you gentlemen might be right. There are two or three features in this picture that look to me would be unsuitable to young people. Actually, they have tried to track that Friedman case, looks like, in this ordinance, and if any ordinance can be passed, why, it looks like they have taken every ground to pass one, if one can be valid, that is, valid. So I enjoin the exhibitor, its agents, servants, attorneys and employees from exhibiting it. I

guess it is like a book by Mark Twain where he had a vaudeville show and was making no money, the owners of it. Then he had a man to get nude and painted him in striped paint, charged a dollar, which was unheard of in those days, limited it to men only and said, "If this doesn't get the money, I don't know Arkansas," and they did quite well. I sustain the City's position, find it okay, and enjoin them.

Mr. Hartt: If the Court please, we except and give notice of appeal.

(Discussion between court and counsel concerning the next case.)

Mr. Hartt: If the Court please, we have a matter here now which will be going up on appeal, as the Court might anticipate. It is a temporary injunction proceeding. As the Court is aware, it is not required that we have findings of fact and conclusions of law to appeal such an item. How-[fol. 151] ever, it is welcome to have them, and we would ask the Court if the Court would be willing to assist us in this matter and make findings at the Court's earliest convenience so that we can have the matter before the appellate court fully.

The Court: I believe that is the only advantage that a nisi prius judge has in a matter of this kind: he doesn't have to file any.

Mr. Hartt: And I can go up without it, but I am inviting the Court to do it, if the Court will.

The Court: I decline. I have so many irons for a little fellow. I have taken on more than I can do, trying to decide a big case here, and I have got others at home and here and in Hill County where I have been helping out, and I do not have time to do it. I decline.

Mr. Hartt: I don't want to press this, but I have another problem. In the Vannis case we made such a request in writing. I don't want to belabor this thing, but the Fort Worth Court of Civil Appeals cut me up badly saying they didn't get to see what the trial court saw. Would the Court

be willing to let the judgment state that in open court as one of the things that happened, we made this request and the Court declined?

The Court: Yes, of course, that is a correct statement.

Mr. Tobolowsky: Your Honor, before you close the proceedings and while the City Attorney is here, the defendant, of course, wants to abide by the Court's decision and is [fol. 152] prepared to do so. It is a question now of timing. Is the injunction issued immediately, because that picture is going to start playing right now?

The Court: It is issued now.

Mr. Tobolowsky: Your Honor, there is no possible way we can change any advertising for today. I will call the client and instruct him to change it for tomorrow, and I will call the client and instruct him not to sell any tickets in violation of the ordinance as of right now.

Mr. Bickley: We agree with this, Your Honor.

Mr. Tobolowsky: I will call immediately.

Mr. Hartt: If the Court please, the City has one other burden that should be dealt with while we are assembled on this matter, and that is to get a speedy trial on the merits. It was heard today in view of the fact that you were kind enough to hear it, but the City has the burden of getting a trial on the merits also at an early opportunity. I need to consult with both my parties, also the intervenor and the City, but this afternoon we should be able to come back to you at that time and ask the Court to fix the time that it can be heard.

Mr. Bickley: We will be glad to try to agree with you on the time. He would have gotten a speedy trial on the merits; if he had agreed to it, this could have been the trial on the merits, Your Honor.

The Court: They may want a jury.

(Discussion among attorneys.)

[fol. 153]

State of Texas
County of Ellis

I, Mary Cave, official court reporter of the 40th Judicial District of the State of Texas, do hereby certify that the above and foregoing 111 pages of typewritten matter constitute a transcript of the evidence, in question and answer form, in the cause of the City of Dallas vs. Interstate Circuit, Inc., No. 66-1280-B in the 44th Judicial District Court of Dallas County, Texas, and I do further certify that such transcript is true and correct.

Witness my hand this the 23rd day of February, 1966.

Mary Cave.

Approved:

Ted P. MacMaster, Attorney for Plaintiff.

Grover Hartt, Jr., Attorney for Defendant.

Dan McElroy, Attorney for Intervenor.

[fol. 155]

IN THE 44TH JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

PLAINTIFF'S EXHIBIT 1

ORDINANCE NO. 11284

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by adding thereto a new chapter known as Chapter 46A; Providing for the establishment of a Motion Picture Classification Board; Outlining classification procedures; Defining Offenses related to the exhibition of films classified "Not Suitable for Young Persons"; Providing for the issuance, revocation and suspension of licenses, Providing for judicial review; Defining public nuisances;

Providing for injunctive relief; Providing for an exception to State law; Providing for a severability clause; Providing for a Penalty; Providing for the repeal of Ordinance No. 10963 enacted by the City Council on April 5, 1965, and enacting this ordinance in lieu thereof; and Declaring an Emergency.

WHEREAS, the City Council after investigation on the part of the members of said Council and the hearing of evidence and testimony at a public hearing called for that purpose, is of the opinion and finds that certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior and, along with other factors, tend to incite criminal behavior on the part of young persons; and

WHEREAS, the City Council is of the opinion that legislative action should be taken by this Council for the purpose of classifying the movies to which such young persons of school age are admitted without proper supervision; and

WHEREAS, the City Council is of the opinion and finds that a great portion of said movies are available for screening and for showing more than thirty days prior to their initial [fol. 156] exhibition and that the benefits to the public will far exceed the burden placed upon the motion picture industry by having said movies screened and classified; and

WHEREAS, the City Council is of the opinion and finds that motion picture films possess a greater capacity for good and for evil among young persons of school age than most other modes of expression and are, therefore, affected with a public interest; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

Section 1. That Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and it is hereby amended by adding thereto a new chapter known as Chapter 46A, consisting of Sections 46A-1 through 46A-11 inclusive, which shall read as follows:

"CHAPTER 46A

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms
§ 46A-2 Establishment of Classification Board
§ 46A-3 Classification Procedure
§ 46A-4 Offenses
§ 46A-5 License
§ 46A-6 Revocation or suspension of license
§ 46A-7 Judicial Review
§ 46A-8 Public Nuisances
§ 46A-9 Injunctions
§ 46A-10 Exception to State Law
§ 46A-11 Severability Clause

[fol. 157]

Section 46A-1. *Definition of Terms*:

(a) 'Film' means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) 'Exhibit' means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) 'Exhibitor' means any person, firm or corporation which exhibits a film.

(d) 'Young person' means any person who has not attained his sixteenth birthday.

(e) 'Board' means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) 'Not suitable for young persons' means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the

judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the [fol. 158] Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

[fol. 159] (l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board*:

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed

to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

[fol. 160] Section 46A-3. *Classification Procedure*:

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary

shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any [fol. 161] proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses*:

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

[fol. 162] (4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceedings before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

[fol. 163] (3) To state falsely that he or she is married for the purpose of gaining admittance to an ex-

hibition of a film classified as 'not suitable for young persons'.

(c) It shall be unlawful for any person:

(1) To sell or give to any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License*:

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

[fol. 164] Section 46A-6. *Revocation or suspension of license*:

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stat-

ing that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file an order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review*:

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

[fol. 165] (1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to

enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the Board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the [fol. 166] submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as its afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for new trial is required, shall file said motion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days' time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board [fol. 167] shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the fil-

ing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall [fol. 168] be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of

such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances*:

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to use reasonable deligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions*:

[fol. 169] Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exception to State Law*:

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause*:

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

Section 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

Section 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

[fol. 170] Section 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

APPROVED AS TO FORM:

N. ALEX BICKLEY, CITY ATTORNEY

PASSED: November 22, 1965

CORRECTLY ENROLLED: November 22, 1965

N. ALEX BICKLEY
City Attorney

ATTEST:

HAROLD G. SHANK
City Secretary

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, Harold G. Shank, City Secretary of the City of Dallas, Texas, do hereby certify that the above and foregoing in a true and correct copy of Ordinance (passed) by the City Council of the City of Dallas, Texas, Nov. 22, 1965.

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, This the 15th day of Feb. A.D. 1966.

HAROLD G. SHANK
City Secretary of the
City of Dallas, Texas

Interstate Circuit, inc.

majestic theatre building dallas, texas 75201

January 24, 1966.

Filed in my office this the
24 day of Jan 19 66
City Secretary, Dallas

Dallas Motion Picture Classification Board
c/o City Secretary
City Hall
Dallas, Texas

RE: Motion Picture: VIVA MARIA!
Theatre: ESQUIRE

Gentlemen:

Pursuant to Section 46A-3(a) of City Ordinance No. 11,284, herewith is furnished material required. The undersigned hereby proposes to classify the above film for exhibition in the above theatre for initial exhibition in the City of Dallas as "suitable for young persons".

Yours very truly,

INTERSTATE CIRCUIT, INC.,

RAYMOND WILLIE,
Vice Pres. & Gen. Mgr.

c.
(att)

Information required by Section 46A-3 attached.

In the 44th Judicial District Court
In and for Dallas County, Texas
Plaintiff's Exhibit 3
[fol. 171]
135

ATTACHMENT TO PETITIONER'S EXHIBIT 3

PETITIONER'S EXHIBIT 8

[fol. 172]

Viva Maria (Motion Picture Herald - 1/5/66 Issue)

United Artists — A Big Comedy

(Panavision; Color)

Let's roll out the superlatives for "Viva Maria," one of the funniest and most imaginative motion pictures to appear on the screen in a very long time.

They said it couldn't be done, when Louis Malle expressed his intention to make a film starring Brigitte Bardot and Jeanne Moreau, two independent females who were reported to have temperaments that would collide on close contact. It turned out to be a stroke of genius in casting; the two French actresses make an unbeatable comedy team that dominates this film in terms of both marquee value and actual performances.

Viva Malle! He not only did a superb job of directing this large-scale color production, but also was co-producer with Oscar Dancigers and shares the original screenplay credits with Jean-Claude Carriere. A big outdoor comedy, beautifully photographed on location in Mexico, the film moves with unbelievable energy as it relates how a troupe of acrobats, magicians, strongmen and other performers get embroiled in a Mexican-style peasant revolution at the turn of the century.

One of the amazing things about this film is that although it was done on a lavish scale, the humor is never diluted, a pitfall that most films of this type have been unable to avoid. Presented in a French version, with English subtitles, in its initial major bookings, the film will also be presented later in a dubbed version. But even general audiences will love the French version, for most of the comedy is visual. The funniest scenes —a rider trying to dash away on a marble horse, a pigeon taught to drop grenades on the enemy, etc.—must be seen to be appreciated.

Brigitte Bardot is cast as the daughter of an Irish rebel, whose specialty is blowing up British soldiers around the globe. Finally, in South America, her father dies doing the thing he likes best and Bardot must hide with a troupe of performers touring the countryside. She joins singer Jeanne Moreau in a Parisian dance hall act, accidently invents a striptease number and the two girls become a hit.

Both named Maria, the song and dance girls get involved in a revolution led by handsome George Hamilton. When Hamilton is killed, Moreau, who had fallen deeply in love with, him, decides to continue his crusade. The two Marias make a deliciously contrasting pair of revolutionaries. Bardot's background has made her an expert on weapons and explosives: She conveys the image of an innocent girl with a smile on her face and a stick of dynamite in her hand. Moreau plays the serious leader, always mourning her lost love.

Bardot and Moreau make an exciting comedy team. In addition to the two actresses and Malle, credit for this film should also go to director of photography Henri Decae and Georges Delerue, who composed the rousing original music. "Viva Maria" is a French-Italian co-production of Nouvelles Editions de Films-Les Productions Artistes Associes, S.A. (Paris) and Vides Cinematografica (Rome).

In its imaginative style, rich and irreverent humor and excellent production techniques, "Viva Maria" reminds one of another big comedy hit of several years ago. It may very well be the "Tom Jones" of 1966.

Seen at a screening in New York. Reviewer's Rating: Excellent—SY OSHINSKY.

Release date, Spring, 1966. Running time, 119 minutes.

Maria II .....Brigitte Bardot
Maria I .....Jeanne Moreau
Flores .....George Hamilton
Madam Diogene .....Paulette Dubost
Diogene .....Gregor Von Rezzori
Werther .....Poldo Bendandi
Rodolfo .....Claudio Brook
Rodriguez .....Carlos Lopez Moctezuma
Juanito .....Jonathan Eden
Francisco Reiguera, Adriana Roel, Jose

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, Harold G. Shank, City Secretary of the City of Dallas, Texas do hereby certify that the above and foregoing is a true and correct copy of application for classification by the Dallas Motion Picture Classification Board filed in my office the 24th day of January 1966.

WITNESS MY HAND AND the seal of the City of Dallas, Texas, This the 15th day of February A.D. 1966.

Harold G. Shank
City Secretary of the
City of Dallas, Texas

[fol. 173]

IN THE 44TH JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

PLAINTIFF'S EXHIBIT 4

DALLAS MOTION PICTURE
CLASSIFICATION BOARD

Wednesday, February 9, 1966—12:15 P.M.

Regular Meeting, John D. Gilliland,
Vice-Chairman, Presiding.

ROLL CALL:

Present: John D. Gilliland, Mrs. Russell Pollard, Mrs. Van Calvin Ellis, Mrs. Edwin Ornish, Reverend J. Robert Maceo, Morton A. Lewis, John P. Reed and Alternate Members A. C. Moser, Jr., and Charles Bartush—9

Absent: Dan Eddy, Reverend Ira Galloway—2

The Minutes of the meetings of January 31, 1966, and February 4, 1966, were read and approved.

The movie STRANGE BEDFELLOWS (Delman), heretofore taken under advisement to be screened, was again called. After discussion, it was moved by Mrs. Ornish and seconded by Mrs. Ellis that the movie STRANGE BEDFELLOWS be classified as "Suitable for Young Persons." Motion unanimously carried.

The movie THAT MAN IN ISTANBUL (Wilshire, etc.), heretofore taken under advisement for additional information, was again called. After consideration, it was moved by Mr. Lewis and seconded by Mrs. Ellis that the movie THAT MAN IN ISTANBUL be classified as: "Suitable for Young Persons."

ROLL CALL ON MOTION:

Aye—Gilliland, Ellis, Maceo, Lewis, Reed, Pollard—6
Nay—Ornish, Moser, Bartush—3
Motion carried.

The movie VIVA MARIA (Esquire) heretofore taken under advisement for screening, was again called. After discussion, it was moved by Reverend Maceo and seconded by Mrs. Ellis that the movie VIVA MARIA be classified as: "Unsuitable for Young Persons." Motion carried, Mrs. Ornish not voting.

The movie MOMENT TO MOMENT (Palace) heretofore taken under advisement for screening, was again called. After consideration, it was moved by Mr. Lewis and seconded by Mr. Moser that the movie MOMENT TO MOMENT be classified as: "Suitable for Young Persons." Motion unanimously carried.

The movie THE SILENCERS (Majestic) heretofore taken under advisement for screening, was again called. After consideration, it was moved by Mr. Moser and seconded by Mrs. Pollard that the movie THE SILENCERS be classified as: "Unsuitable for Young Persons." Motion unanimously carried.

The movie INSIDE DAISY CLOVER (Palace) heretofore taken under advisement for screening, was again called. After consideration, it was moved by Mrs. Pollard and seconded by Mr. Reed that the movie INSIDE DAISY CLOVER be classified as: "Suitable for Young Persons." Motion unanimously carried.

The movie BLOOD AND BLACK LACE (Texas, etc.) heretofore taken under advisement for screening, was again called. After consideration, it was moved by Mrs. Pollard and seconded by Mr. Moser that the movie BLOOD AND BLACK LACE be classified as: "Not Suitable for Young Persons." Motion unanimously carried.

Mr. Lewis: "I move that the Board affirmatively classify I'LL TAKE SWEDEN as: 'Not Suitable for Young Persons;' that the City Secretary affirmative notify the exhibitor that the Board has so classified it previously and reiterate it today; and, further, in the even an application for suitability is made as a reclassification, that the requisites of the ordinance were not complied with, and the Board did not consider it as a reclassification request, but advise you that it is not suitable." Motion seconded by Mrs. Pollard. Motion unanimously carried.

It was moved by Mr. Lewis and seconded by Mr. Bartush that the movie WORLD OF SUZIE WONG be screened. Motion unanimously carried. (Park Forest, etc.)

[fol. 174]

It was moved by Mr. Lewis and seconded by Mrs. Pollard that additional information be obtained from the applicant on the movie WHO'S GOT THE ACTION (Park Forest, etc.). Motion unanimously carried.

The following is a list of movies presented to the Board upon which no specific action was taken thereby rendering them classified as: "Suitable for Young Persons."

THE TRAIN WAR PARTY HOW TO MURDER YOUR WIFE

The Dallas Motion Picture Classification Board Adjourned.

Approved DAN EDDY
Chairman

ATTEST:

HAROLD G. SHANK
Secretary

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, Harold G. Shank, City Secretary of the City of Dallas, Texas do hereby certify that the above and foregoing is a true and correct copy of the minutes of the Dallas Motion Picture Classification Board at their meeting of February 9, 1966.

WITNESS MY HAND AND THE SEAL of the City of Dallas, Texas, This the 15th day of February A.D. 1966.

(Seal)

HAROLD G. SHANK
City Secretary of the
City of Dallas, Texas

[fol. 175]

IN THE 44TH JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

PLAINTIFF'S EXHIBIT 5

February 9, 1966

Mr. Raymond Willie
Vice Pres. & Gen. Mgr.
Interstate Circuit, Inc.
Majestic Theatre Building
Dallas, Texas 75201

Filed in my office this the 24th day of Jan. 1966

Dear Mr. Willie:

On February 9, 1966, the Dallas Motion Picture Classification Board met, and a majority of the Board was not satisfied that your proposed classification of "Suitable for Young Persons" was proper for the following movies:

VIVA MARIA	Esquire Theatre
THE SILENCERS	Majestic Theatre

The Board classified these movies as NOT SUITABLE FOR YOUNG PERSONS, and in accordance with City Ordinance No. 11284, the Board directs that you exhibit these movies as ones: "Not Suitable for Young Persons."

The following movies were classified by the Board as: "Suitable for Young Persons."

Inside Daisy Clover	Palace Theatre
That Man in Istanbul	Wilshire Theatre
Moment to Moment	Palace Theatre.

Yours very truly,
Harold G. Shank
City Secretary

HGS/cas

State of Texas
County of Dallas
City of Dallas

I, Harold G. Shank, City Secretary of the City of Dallas, Texas do hereby certify that the above and foregoing is a true and correct copy of the classification of the motion picture Viva Maria by the Dallas Motion Picture Classification Board.

Witness my Hand and the seal of the City of Dallas, Texas, This the 15th day of February A.D. 1966.

Harold G. Shank
City Secretary of the
City of Dallas

[fol. 176]

IN THE 44TH JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

PLAINTIFF'S EXHIBIT 6

Filed in my office this the 11 day of Feb. 1966

WHEE ARMSTRONG
Asst City Secretary,
Dallas

INTERSTATE CIRCUIT, INC.

EXECUTIVE OFFICES
MAJESTIC THEATRE BUILDING, DALLAS, TEXAS 75201

February 11, 1966

Dallas Motion Picture Classification Board
c/o City Secretary
City Hall
Dallas, Texas

Re: Motion Picture: VIVA MARIA
Theatre: Esquire

Gentlemen:

Pursuant to Section 46A-7(a) of City Ordinance No. 11,284, the above named exhibitor hereby notifies you of non-acceptance of your classification and advises that the above named exhibitor intends to exhibit the above named film under a classification of "suitable for young persons".

Yours very truly,

INTERSTATE CIRCUIT, INC.

By: VAN ALEN HOLLOMON
Van Alen Hollomon
Secretary

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, Harold G. Shank, City Secretary of the City of Dallas, Texas do hereby certify that the above and foregoing is a true and correct copy of Interstate Circuit, Inc.'s non-acceptance of the Dallas Motion Picture Classification Board's classification of the motion picture VIVA MARIA filed in my office the 11th day of February, 1966.

WITNESS MY HAND AND the seal of the City of Dallas, Texas, This the 15th day of February A.D. 1966.

HAROLD G. SHANK
City Secretary of the
City of Dallas

[fol. 177]

IN THE 44TH JUDICIAL DISTRICT COURT
IN AND FOR DALLAS COUNTY, TEXAS

PLAINTIFF'S EXHIBIT 9

(See opposite) ☞

Viva **Fun!** Viva **Can-Can!** Viva **Adventure!** Viva **Strip-Tease!** Viva **Love!** Viva **Boom-Boom!**

VIVA BARDOT
VIVA MOREAU

P-9
2-15-66

IN LOUIS MALLE'S **"VIVA MARIA"!**

(Viva Don't Miss it!)

EXCLUSIVE FIRST DALLAS ENGAGEMENT

BRIGITTE BARDOT · JEANNE MOREAU in **LOUIS MALLE'S "VIVA MARIA"** with PAULETTE DUBOST · GREGOR VON REZZORI · POLDO BENDANDI CLAUDIO BROOK · CARLOS LOPEZ MOCTEZUMA · JONATHAN EDEN and **GEORGE HAMILTON**

Director of Photography HENRI DECAE · Original Music Composed by GEORGES DELERUE · Color Consultant and Costume Design GHISLAIN UHRY · Original Screen Play by LOUIS MALLE and JEAN-CLAUDE CARRIERE

Directed by LOUIS MALLE · Produced by OSCAR DANCIGERS and LOUIS MALLE · Filmed in **PANAVISION** **EASTMANCOLOR**

A Franco-Italian Co-Production: Nouvelles Editions de Films – Les Productions Artistes Associes, S.A. (Paris) and Vides Cinematografica (Rome)

Released thru **UNITED ARTISTS** ORIGINAL MOTION PICTURE SCORE AVAILABLE ON UNITED ARTISTS RECORDS

OPEN DAILY 12:45 P.M.
FEA. 1:00, 3:00, 5:10, 7:25, 9:40
PLUS—HERE'S NUNDIE COLOR CARTOON

STARTS **THURSDAY!**

ESQUIRE
OAK LAWN AT LEMMON

PRINTED IN U.S.A.
Form E420 100M 4/64

PAGE 2

EXCHANGE COPY

UNITED ARTISTS CORPORATION
COMPETITIVE BID APPLICATION & CONTRACT FOR

DALLAS
BRANCH

ZONE

RIVA MARIA
PICTURE

1/11/66
DATED

J-1
2-17-66

DIRECTIONS

1. Insert all terms of your bid. No bid will be considered unless the schedule and bid are completely filled out.
2. It is imperative that the PLAY DATE SPACE be filled in so that the Producer can properly appraise this bid. If the exact availability is unknown, an approximate playdate is to be given, or you should specify the maximum number of days after the availability date that the picture will play. We will notify you when this date is set.
3. Execute where indicated below.
4. All bids must be received by 12 NOON 1/17/66
5. Retain last copy and return all other copies in envelope enclosed.

NOTE—Distributor reserves the right to reject all bids received.
In the event that the above picture is awarded to any exhibitor as a result of bids submitted pursuant to this invitation, then the bid which has been accepted will be available for inspection to all who have submitted bona fide bids, which have not been accepted, for a period of 7 days commencing from the date of notification to you that an award has been made.

APPROVED
Follow Up Copy Pulled
COUNTY, TEXAS
Exhibiters Copy Mailed
195
Cursit Posted
Work Completed.

The following SCHEDULE and all written and printed parts thereof are a part of this License, for the above entitled motion picture.

SCHEDULE

Theater ESQUIRE FIRST Run or Availability FEBRUARY 1966

Town and State DALLAS, TEXAS Zone A Seating Capacity

Owner INTERSTATE CIRCUIT, INC. Address MAJESTIC THEATRE BLDG., DALLAS

BID OF EXHIBITOR

THIS IS A COMPETITIVE BID THEREFORE NO ADJUSTMENT OR REVISION OF TERMS WILL BE GRANTED
NO BID WHICH CONTAINS ALTERATIONS OR ERASURES WILL BE CONSIDERED

1. Film Rental 1st week 50-60% Scale; 2nd week 40-60% Scale; 3rd week 30-60% Scale; all other playtime 25-60% Scale. (See scale below)
   Flat, Percentage or Guaranteed Minimum Film Rental (To Be Paid Seven (7) Days In Advance) and percentage
2. Number consecutive days Four (4) to six (6) consecutive weeks playing time.
3. Days of week
4. Actual playdates or length of time, including preferred playing time, if any, after availability picture will be exhibited
   Picture to open in February following "Say Nothing Came In from the Cold".
5. Amount, if any, exhibitor intends to spend on advertising Co-operative advertising campaign is to be mutually agreed upon between distributor and exhibitor.
6. Other terms

25%	27½%	30%	32½%	35%	37½%	40%	42½%	45%	47½%	50%	52½%	55%	57½%	60%
Under 450.	475.	500.	525.	550.	575.	633.	696.	766.	843.	927.	1020.	1122.	1234.	per unit

7. Clearance desired Normal

HEATER CHARGES—DEDUCTIONS: The exhibitor shall include all receipts obtained from the rental of heaters or from heater service charges when computing "gross receipts" and the Exhibitor may deduct the actual receipts obtained from the rental of one (1) heater unit per car PROVIDED that such rental is OPTIONAL with the patron, and further, that such deductions shall not exceed ..... cents per car. The payment for all taxes imposed by rental of heaters or from heater service charges, shall be borne by the Exhibitor.

The Exhibitor agrees to adhere in its advertising and publicity to the instructions issued to the Exhibitor by the Distributor or as set forth in the press book submitted by the Distributor.

IN WITNESS WHEREOF, the Exhibitor has on the 17th day of Jan 19 66, executed this competitive bid application, which upon approval by the Producer and acceptance by the Distributor at its home office in New York City by its affixing hereto the facsimile or perforated or written signature of a person authorized to sign this application and contract, and delivery to the Exhibitor of a duplicate copy thereof, shall constitute a contract of license for the exhibition of this motion picture but only at the theatre and on the dates specified herein and in accordance with the terms and conditions hereof and no deviation from the stipulated terms will be permitted.

Exhibitor INTERSTATE CIRCUIT, INC. L. S.
[illegible] — A Corporation
(Strike out two)

By
Partner — General Manager — Officer
(Strike out two)

Lessee
Owner
Operator
(Strike out two)

ACCEPTED at New York, N. Y.
UNITED ARTISTS CORPORATION
DATE

BY

JJ:c

END OF CONTRACT

BEGINNING OF THE

CONTRACT OF LICENSE

The following is the contract of license for each picture for which the application of the Exhibitor is accepted by the Distributor at its home office in New York City:

LICENSE—The DISTRIBUTOR grants and the EXHIBITOR accepts a limited license under copyright to exhibit the same publicly at only the theatre and on only the date or dates specified in the Schedule hereof or otherwise set in accordance with the terms hereof and confirmed in writing by Distributor. Unless otherwise expressly permitted in the Schedule, said license includes no right to exhibit at any time or place other than on the date or dates at the designated theatre as above provided and confirmed by Distributor.

PAYMENT—

The Exhibitor agrees to pay to the Distributor at the city in which is located the Exchange from which Exhibitor is served, the license fee or the guaranteed Minimum Film Rental set forth in the Schedule at least 7 days in advance of the fixed date of the exhibition of each picture.

If any part of the license fee is a percentage of the Exhibitor's gross receipts, Exhibitor agrees to make payment thereof to Distributor at the end of each day's exhibition, and at the same time furnish the Distributor with a correct itemized statement of the gross receipts of said theatre on forms furnished (at the option of Distributor) by Distributor, with all requested information completed, signed by the Exhibitor or his manager, cashier, or treasurer. As to each such picture, the Exhibitor agrees to account to Distributor for each person admitted (except free admissions when approved by Distributor) on the basis of the respective admission prices in effect at the theatre at each performance during the entire engagement of the picture. Admission taxes collected may be deducted before computing Distributor's share. As to each picture licensed upon a percentage basis, the Exhibitor agrees that at all times during the engagement of said picture only serial numbered tickets will be used, with a separate and distinct series for each established price; that the tickets of each series will be issued consecutively in the order of the serial numbers of the particular series; that a separate such ticket will be issued to each person admitted, and that not more than one series of tickets of each price class will be used at any one time. As an essential and vital condition of this entire agreement, the Exhibitor agrees that an authorized representative of the Distributor shall, at all times during each exhibition, have access to all parts of the theatre including the box office and to all other places, persons and devices concerned with the sale and collection of admissions and admission tickets and the right to examine the admission tickets, the Exhibitor's books and records relating to the gross receipts, and an authorized representative of the Distributor shall have the right to "audit" at any time thereafter all Exhibitor's books and records pertaining to or useful in determining the correct and accurate receipts in which Distributor is entitled to share, the ticket sales and admissions, and to make record of the numbers of the admission tickets on sale during the course of said exhibition. In the event that an audit or checking reveals that the Exhibitor has underreported its Admission Receipts or has misrepresented its operating expenses, the Exhibitor agrees, in addition to recomputing and making immediate payment of the film rental due based on the actual admission receipts and the true operating expenses, to pay all costs and expenses incurred by Distributor for the audit, checking and any attorneys' fees incurred by Distributor in connection therewith. Exhibitor agrees that it will not cause, permit or suffer any interference with the checker. In the performance of any of his duties in checking. Should the Exhibitor breach the provisions of this article in any respect, Distributor may at its option terminate this license forthwith, and the Exhibitor agrees immediately upon notice of such termination to cease any further exhibition of the picture, and at the same time to deliver the print to the Distributor, and any continued exhibition of said motion picture by the Exhibitor after such notice of termination shall be without right and without license. The Distributor, or its authorized representative, shall have access, after the receipt by the Distributor of each final box office statement, to all of the Exhibitor's books and records for the purpose of verifying such box office statement. Distributor agrees that any information obtained pursuant to the provisions of this clause will be deemed confidential business information. Exhibitor agrees to segregate the Distributor's share of the gross receipts as such admission moneys are paid into the box office and not to intermingle such funds with any other moneys and to hold such percentage share of the gross receipts in trust for the Distributor and to pay over such trust funds daily, as in this paragraph provided, it being intended that all moneys accruing to Distributor as its share of the Admission Receipts shall, until remitted or turned over to Distributor, be held by Exhibitor in trust for Distributor. Exhibitor agrees to be liable and hereby indemnifies Distributor against any loss, whether through theft, robbery or burglary, of any money accruing to Distributor.

DAMAGES FOR BREACH—

Default. If Exhibitor violates any of the provisions of this agreement or becomes insolvent or is adjudicated bankrupt or executes an assignment for creditors or a receiver is appointed for any of Exhibitor's property, or if Exhibitor violates any of the provisions of any other exhibition contract(s) heretofore or hereafter made with Distributor, then, in any of said events Distributor may either (1) terminate this contract or (2) terminate this and such other contracts or (3) suspend delivery of further pictures hereunder (and, if Distributor elects, also under any or all such other contracts) pending compliance by Exhibitor. Said remedies shall be in addition to and without prejudice to any right or remedy Distributor has at law, in equity, or provided for elsewhere in this agreement on account of any such violation or breach. If Exhibitor fails or refuses to pay any license fee due under this or any such other contract, Distributor may declare such failure or refusal a breach of this entire contract or a breach of this and such other contract (s), and Distributor shall then have the right to recover as damages therefor an amount payable as license fees of all pictures so cancelled and not hitherto exhibited and paid for. If Distributor willfully fails or refuses to deliver any picture licensed hereunder the amount of damages which may be claimed or awarded therefor in any litigation or arbitration shall in no event exceed the license fee herein provided therefor. As to any picture licensed, or designated on guarantee against a percentage participation, said damage shall not exceed such guarantee, and, as to a picture on straight percentage, damage may not exceed an amount to be determined as provided under "if licensed upon a percentage basis."

If Licensed Upon a Percentage Basis. If payment hereunder of the license fee of any such motion picture shall be computed either in whole or in part, upon a percentage of the gross admission receipts of said theatre, and if the Exhibitor fails or refuses to exhibit any such motion picture as herein provided, the Exhibitor shall pay to the Distributor for each day that the Exhibitor fails or refuses to exhibit any such motion picture, a sum equal to such percentage of the average daily gross receipts in such theatre during the period of thirty (30) operating days to wit the sixteen (16) operating days immediately prior to and the fourteen (14) days immediately after but including the date of the mailing of the notice of availability for the specific unplayed picture as set forth in FIXING EXHIBITION DATES Subdivision (2) and in addition any fixed sums payable hereunder in respect thereto. If the Exhibitor shall exhibit any such motion picture for less than the full number of days provided for in this license or less than the full number of days confirmed by the Distributor, the Exhibitor shall pay for each day of the week, Monday thru Friday, of which he fails to exhibit the picture, the Distributor's percentage of a sum equal to Seventy-Five (75%) percent of the gross and/or the sum of One Hundred Fifty (150%) percent for each Sunday or Holiday, and/or the sum of Two Hundred Twenty-Five (22.5%) percent for each Saturday, of the gross receipts of said picture of the last day of exhibition at said theatre. A sworn statement of the said daily gross receipts shall be delivered by the Exhibitor to the Distributor upon demand therefor, signed by the exhibitor or his manager and countersigned by cashier or treasurer.

"Gross receipts" for the purpose of computing the percentage license fee, shall consist of all moneys (exclusive only of admission taxes required by law to be collected from the patrons) received for the privilege of entry to the theatre premises on each exhibition date hereunder, regardless of when or where paid; and unless otherwise expressly authorized in the Schedule hereof or in writing by the Distributor, shall include all moneys so collected from the patrons for the availability, inside or outside of the theatre premises, of any services, facilities, or of any allowances, discounts or rebates in connection therewith, or of any other entertainment on the program with the percentage picture.

FIXING EXHIBITION DATES—

The exhibition date or dates of each motion picture, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon in writing, shall be as follows:

(1) The Distributor agrees to mail to the Exhibitor a notice in writing of the date when a motion picture is available for exhibition by the Exhibitor. Such date is referred to as the available date. Such notice shall be mailed to the Exhibitor at least fifteen (15) days prior to the available date therein specified.

(2) Within fourteen (14) days after the mailing of such notice Exhibitor shall select an exhibition date or dates not theretofore assigned to another exhibitor or other exhibitors, within the period commencing upon the available date and ending thirty (30) days thereafter and give to Distributor written notice of the date or dates so selected, for the theatre set forth in the Schedule.

(3) If acceptable to Distributor, the Distributor shall confirm in writing such date or dates for the designated theatre. If the date shall not be acceptable to Distributor or shall have been assigned to another exhibitor, or if no print shall be available for such date, Exhibitor shall forthwith select another date falling within said period. If the exhibitor fails to select a playdate as herein specified, Distributor may designate the same for a theatre specified in the Schedule by mailed notice.

(4) No notice of availability sent after an Exhibitor's breach shall be construed as or constitute a waiver of any breach of this contract or of any other contract existing at the time the notice of availability is sent.

(5) The Exhibitor agrees to exhibit each motion picture for the license of which it contracts with the Distributor in the sequence of the notice of availability given the Exhibitor, and that this order of exhibition shall be of the essence of the license agreements for the various motion pictures entered into by the parties hereto.

DELIVERY OF PRINTS—

Delivery to the Exhibitor or the Exhibitor's authorize agent by delivery at the Distributor's Exchange, or to a common carrier, or the United States Postal authorities, shall constitute delivery for all purposes under the terms of this agreement.

LOSS AND DAMAGE TO PRINTS—

The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange of each linear foot of any print, lost, stolen, destroyed or injured in any way in the interval between the delivery to and return thereof by the Exhibitor. Such payment however, shall not transfer title to or any interest in any such print to the Exhibitor or any other party, nor release the Exhibitor from any liability arising out of any breach of this agreement. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft, or destruction of or damage or injury to any print. If any print shall be received from the Exhibitor by the Distributor or any subsequent Exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, immediately after the first public exhibition thereof, shall have Telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

RETURN OF PRINTS BY EXHIBITOR—

(a) After the completion of each exhibition hereunder, the Exhibitor agrees promptly to return the prints to the Distributor's Exchange, or as instructed in writing by the Distributor, either to Deliver them to a carrier designated by the Distributor, or to deliver such print to another Exhibitor, and in any case to pay all transportation charges therefor adequately valued and insured.

(b) In the event the Exhibitor is obligated by such written instructions to deliver any such print to another exhibitor, and fails so to do, and should the Distributor suffer damages thereby, the Exhibitor agrees to pay any and all such damages.

CUTTING OR ALTERATION OF PRINTS—

The Exhibitor shall exhibit each picture in its entirety and shall not copy, duplicate, subtent or part with possession of any print thereof, nor shall the Exhibitor cut or alter the same excepting to make necessary repairs thereto, and the Exhibitor shall return each print in the same condition as received, reasonable wear only excepted.

ADVERTISING PRIOR TO FIRST RUN—

If the Exhibitor is granted hereunder a second or subsequent run, the Exhibitor agrees not to advertise any picture to be delivered hereunder except by means of advertisements inside the said theatre not intended for removal therefrom by the public, prior to the exhibition of any such picture by any other Exhibitor having the right to the first or prior run thereof. In the event of any violation of this clause the Exhibitor agrees to pay to the Distributor a sum equal to the damage, if any, so caused such other Exhibitor, and the Distributor may, at its option, terminate the license granted hereunder for that picture to be delivered by the Distributor. The Distributor, however, shall not be liable for any breach of the provisions of this article by any other exhibitor.

C. O. D. SHIPMENTS—

Exhibitor hereby expressly grants Distributor the right to demand and receive, as a condition precedent to delivery of the print of any motion picture contracted for hereunder, payment of all amounts then due Distributor, or due any affiliate or subsidiary of Distributor, for the right to exhibit any motion picture of Distributor or any of its affiliates or subsidiaries in any theatre owned or operated by Exhibitor, and Distributor may require payment of such sums by C.O.D. shipments.

TAXES—

The Exhibitor agrees to pay to the Distributor an amount equal to the aggregate of all taxes now in effect or hereafter imposed or based upon the license, delivery, exhibition, possession or use by the Exhibitor of the prints of the motion pictures licensed hereunder, or upon the grant of such license or the exercise thereof, or measured by the license fees, however determined, paid or payable by the Exhibitor to the Distributor under this license. The word "tax" as used in this paragraph shall be deemed to include, but shall not be limited to, taxes, fees, assessments, charges, imposts, levies, excises, whether denominated a sales, gross income, gross receipts, personal property, storage, use consumption, license, compensating, excise or privilege tax. If the amount of any tax payable under this clause cannot be exactly determined, the Distributor may estimate the amount of such tax and the Exhibitor shall pay to the Distributor such estimated amount upon demand therefor; provided, however, that upon the determination of the exact amount of any such tax the Exhibitor shall be entitled to repayment of or credit for any excess amount paid. Upon the failure or refusal of the Exhibitor to pay any tax or any part the reof, the Distributor shall have all the remedies herein provided for the collection of license fees as well as all other remedies provided by law.

PASSES—

It is mutually agreed that the Exhibitor will not issue more than 2% of the total number of admission in passes throughout the entire license period. If the aggregate number of passes issued by the Exhibitor exceeds the agreed upon percentage, then the Exhibitor when computing the film rental payable hereunder shall account for each such additional pass upon the basis that a maximum adult admission price had been received; except where there is an express prohibition against any passes.

VERBAL PROMISES; CHANGES MUST BE IN WRITING—

This license agreement is complete, and all promises, representation, understandings and agreements in reference thereto have been expressed herein. All prior negotiations and agreements are merged herein. The provisions hereof, including, but not limited to, the film rental provisions, shall not be affected by any custom and usage, alleged or actual. No change, modification or assignment hereof shall be binding upon the Distributor unless in writing signed by any person duly authorized by the Distributor in its main office in New York City.

CONTINUED ON PAGE 2

[fol. 179]

[fol. 180]

IN THE 44TH JUDICIAL DISTRICT COURT

IN AND FOR DALLAS COUNTY, TEXAS

INTERVENOR'S EXHIBIT 2

No. 66-1280-B

CITY OF DALLAS, Plaintiff,

v.

INTERSTATE CIRCUIT, INC. and UNITED ARTISTS CORPORATION, Defendants.

AFFIDAVIT

STATE OF TEXAS
COUNTY OF DALLAS

RUSSELL L. BRENTLINGER, being duly sworn, deposes and states:

1. I am the Branch Manager of the Dallas office of United Artists Corporation. The Dallas office is responsible for distributing films for United Artists Corporation generally in the States of Texas and Oklahoma.

2. United Artists Corporation has the exclusive domestic distribution rights of the motion picture "Viva Maria" and in addition has a share in the producer's profits from that movie, as distinguished from the distribution profits from the same.

3. As Branch Manager, I am familiar on a day to day basis with the national performance of all pictures distributed by United Artists Corporation. I know and make it a point to keep track of the critics' and the public's reception of the films we distribute.

[fol. 181] 4. "Viva Maria" has been exhibited in premiers in Los Angeles, California, and in New York City. In the former city it premiered on December 20, 1965, in the Bruin and Vogue theaters. In the latter city, it premiered in the Astor and the Plaza theaters on December 18, 1965. Concurrently with the opening in Dallas, Texas, the picture "Viva Maria" is now having its national release and is opening in numerous cities, for the first time, all over the United States.

5. The movie "Viva Maria" had an exceedingly good reception at its premiers in Los Angeles and New York, both by the public and the critics, as evidenced by the representative reviews from the following publications on the dates indicated: the New York Times on December 20, 1965, the New York Daily News on December 20, 1965, the New York Post on December 20, 1965, and Variety on December 8, 1965. A true and correct copy of each of these reviews is attached hereto and incorporated herein by reference for all purposes the same as if fully set out herein. The title and date of the respective publications are correctly stated in the lefthand corner of the reproductions of the said reviews so attached and incorporated herein by reference.

/s/ RUSSELL L. BRENTLINGER
RUSSELL L. BRENTLINGER

SUBSCRIBED and SWORN TO before me, a Notary Public in and for said County and State, this 18th day of February, 1966.

/s/ MARGARET L. WARNER
Notary Public in and for
Dallas County, Texas.

[Seal]
My commission expires June 1, 1967.

MARGARET L. WARNER

(See opposite) ☞

N.Y. TIMES
12-20-65

The Screen: 'Viva Maria' Opens Here

Bardot-Moreau Movie Recalls Road Pictures

By BOSLEY CROWTHER

WHO would ever have expected to see Brigitte Bardot and Jeanne Moreau, the two most formi-DA-ble female figures now disporting in French films, caught up in the sort of wild adventures that used to engage Bing Crosby and Bob Hope in one of the boys' outrageous old "Road" films. You might have imagined the ladies to be too serious, too dignified, too concerned about the possible damage that might be done to their valuable physiques.

Yet here they are, bouncing and tumbling through just some such crazy goings-on in Louis Malle's "Viva Maria," which opened Saturday night at the Astor and the Plaza, with Miss Bardot graciously on hand to give ample demonstration that no damage had been done, at least, to hers.

o

What they are loosely caught up in—and loosely is as good a word to convey a sense of the sheer abandon of this picture as any of which I can think—is a farcical fabrication of a revolution in Mexico about the time Pancho Villa was touring his melodrama there.

As a couple of song-and-dance artistes in a tiny carnival that moves around the country in several wildly careening horse-drawn vans, the ladies—Maria & Maria—are doing all right with their striptease until one of them (Miss Moreau) falls in love with a somber revolutionist, played by George Hamilton. Then suddenly the focus of their interest and that of their carnival troupe is, first, the liberation of the leader and then the carrying on of his cause, which is the overthrow of a rich villain named Rodriguez, after the leader has been killed.

At least, that is more or less the pattern of events as I call them to mind out of the jumble of random recollections of crazy business that races through my head. But the plot doesn't really matter too much, for it's quite clear that Mr. Malle was more interested in his slapstick inventions than in where they went or what they might remotely prove.

He was interested in setting up Miss Bardot as an innocent trained as a child to plant bombs and touch off explosions for a father who liked to see things blow up. (You can, if you wish, find some significance in this, with respect to Miss Bardot.) He was interested in showing the development of an artless, impromptu striptease, invented by Miss Bardot when she first joins the act with Miss Moreau.

He was interested in Mack Sennett chases and the throwing of incendiary bombs and the pulling of tricks by a magician and the beauty of the Mexican countryside, which is handsomely caught in color in this picture. And it appears that he was also interested in making as much light-hearted fun of the clergy in his whipped-up insurrection as he makes of the villainous landowner.

As with most pictures put together in this studiedly spontaneous way, there are sequences and scenes that are very funny, more that are labored and dull. Flashes of wit, sight and verbal, are sprinkled amid stretches of sodden farce. Every so often, something happens that startles a happy guffaw. Minutes pass when we are conscious of nothing but the strain of Mr. Malle.

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As a consequence, the acting opportunities for Miss Bardot and Miss Moreau are limited to those few, infrequent incidents in which they can show a shocked expression or flounce a hip. For the most part, they are amusing mainly because of the incongruity of their being here, acting farce with almost as much insignificance as anonymous Mack Sennett bathing girls.

Mr. Hamilton has virtually nothing to do, except hold up a beam that is placed across his shoulders in the prison as a torture device and becomes a quite obvious inconvenience when Miss Moreau comes to him to make love. Others in the roles of carnival performers and Mexican characters are up to their jobs.

For no particular reason or advantage, the language spoken is French—except for one man who occasionally blurts out English. The film is translated in subtitles.

Jeanne Moreau, left, and Brigitte Bardot in the new film

The Cast

VIVA MARIA, original screenplay by Louis Malle and Jean-Claude Carriere; directed by Mr. Malle and produced by him and Oscar Dancigers for United Artists release. At the Astor, Broadway at 45th Street, and the Plaza, 58th Street east of Madison Avenue. Running time: 125 minutes.

Maria I	Jeanne Moreau
Maria II	Brigitte Bardot
Flores	George Hamilton
Madame Diogene	Paulette Dubost
Diogene	Gregor von Rezzori
Werther	Poldo Bendani
Rodolfo	Claudio Brook
Rodriguez	Carlos Lopez Moncizezuma
Father Superior	Francisco Reiguera

N.Y. DAILY NEWS
7-2-69

MOVIES

Bardot and Moreau —2 Zanies With Zing

Brigitte Bardot (l.) and Jeanne Moreau.

By WANDA HALE

★ ★ ★ ★

With Gallic humor and Hollywood know-how, obtained from keen observation, Louis Malle has made le western fou—meaning a mad, zany, crazy western. "Viva Maria" is its name, co-starring Brigitte Bardot and Jean Moreau as a song and dance team with a travelling circus who become leaders in a Central-American revolution.

Leave your incredulity at home before going to either the Astor or the Plaza Theatre to see this outrageously funny spoof on our outdoor action films. English titles are helpful if you don't understand the French language but the action speaks for itself, eloquently. As the French love our westerns, M. Malle will most likely win the legion d'honneur for outdoing Hollywood at its own game.

MALLE PHOTOGRAPHED his petticoat western in Mexico, Panavision, Eastmancolor, a first for a French director. Stunning scenic backgrounds may get the cameraman a French prize. In the vast undertaking, Malle keeps the story by Jean-Claude Carriere and himself well under control. Every sequence reflects a lively, vivid imagination in this, his first attempt to make a comedy of epic proportions.

As for the stars, Bardot the sex kitten, and Moreau, fine dramatic actress, are both delightful in comedy roles. Moreau is more sedate in her performance but neither overdoes it. Brigitte proves that she is an accomplished comedienne with clothes on. Except for their strip-tease act together, both are fully clothed in dresses of the period, early 20th century. Both girls are named Maria, which adds to the confusion of most characters and the merriment of the film.

Maria I (Moreau) and Maria II (Bardot) are forced into the shootingest revolution in film history by one Flores, played by George Hamilton, who's a failure as an insurrectionist.

ON HIS DEATHBED, Flores makes a request, pleading with the woman he loves, Maria I, to carry on the fight against the rich, brutal despots of San Miguel. Giving her promise, Maria I rallies the lethargic peons into a wildly enthusiastic fighting force.

Teaching peasants the art of guerrilla warfare is Maria II, who has learned revolutionary tactics from her Irish father, an anarchist who was chased out of both Ireland and England and who was killed in Central America.

AN EXPERT with dynamite, guns and small cannon, she leads the rebels in actual warfare. No wonder that the tyrants are wiped out to the last man!

The stars, George Hamilton, and a few French players are assisted by Mexican actors of note and thousands, it seems, of extras. Malle has directed his actors and action with tongue in cheek, a genius for comic invention, an exaggeration of what he has seen in American westerns and a little bit of Ian Fleming thrown in.

Where does he go from here? Not, I hope, to conceal his marvelous sense of humor in those way-out dramas of sordid life. Even if he hasn't directed a masterpiece, Louis Malle has made a fun picture that anybody with a broad sense of humor can enjoy to the fullest.

"Viva Maria," a United Artists release in Panavision and Eastmancolor. Produced by Louis Malle and Oscar Dancigers and directed by Malle from a screenplay by Malle and Jean-Claude Carriere. Presented at the Astor and Plaza Theatres. Running time: 1 hour, 59 minutes. With English titles.

THE CAST:

Maria II	Brigitte Bardot
Maria I	Jeanne Moreau
Flores	George Hamilton
Diogene	Gregor Von Rezzori
Madame Diogene	Paulette Dubost
Rodolfo	Claudio Brooks
Rodriguez	Carlos Lopez Moctezuma
Werther	Poldo Benandi

N.Y. POST
12-20-65

Reviewing Stand

By ARCHER WINSTEN

'Viva Maria' at the Astor & Plaza

You can suspect that French director Louis Malle had a ball writing, directing and making "Viva Maria," now at the Astor and Plaza theaters. One hopes so because someone should have all that intended fun. Not too many in the audience will.

'Viva Maria'

A United Artists release. Produced by Oscar Dancigers and Louis Malle. Directed by Louis Malle. Screenplay by Malle and Jean-claude Carriere. The cast Jeanne Moreau, Brigitte Bardot, Paulette Dubost, Gregor Von Bozzori, Poldo Bendandi, Claudio Brook, Carlos Lopez Moctezuma, Jonathan Eden and George Hamilton. 119 minutes.

The reasons for this very mixed salad of fresh, sometimes fanciful, sometimes flat-on-its-face would-be comedy-satire-burlesque can be traced directly to the variety, scatter-gun technique. Young Mr. Malle is now beginning to know too much about his medium. He wants to do everything at once.

He has brought together two of France's brightest women stars, Jeanne Moreau, the actress, and Brigitte Bardot, the onetime sex symbol from France and still an international personage. He has transported his company to Mexico, taken the trouble to extract beautiful costumes from Ghislain Uhry, and matched that with the precaution of using a splendid photographer, Henri Decae. The music by the great Georges Delerue is from the top drawer.

Unfortunately Malle has employed himself as writer along with Jean-Claude Carriere. They create like a pair of college *terrible children* thumbing their nose at church, state, banks and the oppressive rich in some mythical South-of-the-Border Hispanic country.

They have seen to many American Westerns, burlesques of Westerns, and Mack Sennett comedies. They are so sophisticated themselves that they can have touches of surrealism, and Tarzan swinging through the trees (really Brigitte), and guns that shoot around corners through a bent barrell.

Nice Birth of Tease

They can document the invention of the striptease—it's rather nice as Jeanne and Brigitte do it, especially in those beautiful clothes—and they do not blink at a girl's vigorous introduction to sex.

There is one extremely funny and, as far as this observer is cornered, original gag. A group of fighters mount horses and gallop off, leaving behind one furious rider who whips his mount to no avail. He is on a statue.

At the beginning of the picture Brigitte has been extensively introduced as the bomb-detonating infant of an Irish revolutionary. This is how she becomes so skillful.

And Jeanne is an actress with a travelling French circus which has a strongman and a magician and some acrobats.

George Hamilton shows up as an intense, bearded, doomed young leader of oppressed people. He is also catnip to Jeanne.

The picture never stops bombing along at high action, mortality and amatory rates. Everyone, good guys and bad guys alike, has romantic intentions.

But you can't take it seriously because obviously the picture makers have to be kidding. But the exaggerations, and the satire, and struggles of rich with poor don't make much of a point either. You suspect that Malle may be throwing in a bit of surrealism because he has a little of that to spare, and that something you could call antique expressionism also makes an occasional splash.

The main point is that a lot of it cancels out rather than reinforces the rest of it. In a very real sense they get nowhere in a rather long journey, and that means a waste of some spectacular talents. Despite all the fierce action, signifying nothing much, boredom settles over this beautiful shot-ridden countryside.

Louis Malle, who has tried his talents in so many directions, here finds another that doesn't suit him. Brigitte and Jeanne and United Artists may be able to rescue it by sheer star-and fire-power, but if they do, it won't be without suffering on the part of people who have been had.

[fol. 184]

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VARIETY

12-8-65

Viva Maria
(FRENCH-COLOR-SONGS)

Bardot - Moreau - Hamilton names in lively comedy. Good prospects.

Paris, Dec. 7.

United Artists release of NEF-Artistes Associes-Oscar Dancigers-Vides Film production. Stars Brigitte Bardot, Jeanne Moreau; features George Hamilton, Claudio Brooks, Carlos Lopez Moctezuma, Gregor Von Rezzori, Paulette Dubost, Luis Rizo. Directed by Louis Malle. Screenplay, Jean-Claude Carriere, Malle; camera (Eastmancolor), Henri Decae; editor, Kanout Peltier, Suzanne Baron; music, Georges Delerue. Previewed in Paris. Running Time, 120 MINS.

Maria I ..... Jeanne Moreau
Maria II ..... Brigitte Bardot
Flores ..... George Hamilton
Rodolfo ..... Claudio Brooks
Magician ..... Gregor Von Rezzori
Rodriguez ... Carlos Lopez Moctezuma
Strongman ..... Luis Rizo

Big Bertha pic looks geared for big business internationally with B.B. (Brigitte Bardot) in her best form since "And God Created Woman," and brilliantly matched by Jeanne Moreau. They are backed by a rollicking, comic adventure opus impeccably brought off by director Louis Malle. The American name is George Hamilton. Film's dialog is in English.

Here is a film that measure up to its advance publicity. It has the wit, scope and color for both arty and playoff or regular firstrun chances. It strikes the right note of larger-than-life adventure, uses sex in a delicious, rather than leering or over-exploited manner and deftly pays homage to the Yank films of this kind in its stable, good natured succession of gags, leavened with some frisky but never blue French humor.

Here is Miss Bardot as the daughter of a life-long anarchist who has spent her life blowing up bridges and police stations. She finds herself hunted in some Latino country in 1910 when she has to blow up papa and a bridge. She is taken up by Jeanne Moreau, a dancer in a traveling music hall cum circus. The two team up.

There follow some knowing takeoffs on the songs of the era with Bardot unwittingly seeming to invent the striptease when her skirt falls off at one show. The tone of this allows big production suddenly to be worked into a moth-eaten bucolic theatre. One bit has them stripping with the last vestments suddenly having a cut.

The fine scripting takes advantage of the land, color, Panavision and outdoor shooting in Mexico as the tale gets the circus involved in a local revolution. Also neatly imbedded are the characters of the femmes, both named Maria. Bardot is an innocent who suddenly discovers love; approves of it, and just uses it like a pure little animal, an epitome of her sex-kitten shenanigans. Moreau is the more knowing and wry one who is still the more romantic and falls for a handsome revolutionary. She takes up his cause after his death.

Some big scale fight episodes are brought off with the right romantic violence and invention. A pigeon that drops grenades, Bardot handling a machine gun or swinging through the trees, Tarzan-like, to wipe out a cannon. The circus performers employ their acrobatic skill also in the fights. The gags spring naturally and are thus more effective.

None of the frenzied cutting, overloaded and forced comedics and leering attitudes towards sex get into this pic. It is a classic tale, set in a fresh, witty and zesty new mold. Production manages to keep up the pace, and rarely sags. The only love scene, of Moreau entering the prison of her hero, with the circus strongman bending the bars, is done with the right romantic flavor.

Color is right, supporting cast very strong and the comedy routines a delight. A local churchman tries to use old Inquisition torture tools on the girls but relents and apologizes when the things break down. As he puts it: "They have not been used in a long time."

Big scale extra scenes and mob fighting are also spectacular with bright gags interlarded. When a bank is blown up it rains gold coins. Exploding a statue of the tyrant has the monument falling among seated people and then a man frantically trying to ride the horse part.

It adds up to a bouncy, broad adventure opus that pays homage to its predecessors yet does not ape them. There should be a big worldwide career for this one in subtitled or dubbed forms. It can play arty and specialized spots easily too. The entertainment knowhow and comedy mix well to give this high b.o. potential.

Mosk.

[fol. 185]

[fol. 186]

No. 66-1280-B

IN THE 44TH JUDICIAL DISTRICT COURT IN AND FOR DALLAS COUNTY, TEXAS

CITY OF DALLAS, Plaintiff,

v.

INTERSTATE CIRCUIT, INC., Defendant,

UNITED ARTISTS CORPORATION, Intervenor.

TEMPORARY INJUNCTION—Entered February 17, 1966

On this the 17th day of February A. D. 1966, came on to be heard the above entitled and numbered cause wherein the City of Dallas, as Plaintiff, seeks a temporary injunction against the Interstate Circuit, Inc., as Defendant, and United Artists Corporation, as Intervenor, have subjected itself to the jurisdiction of thie Court, all parties having been represented by attorneys and in person, and having announced ready for trial, the Court proceeded to examine the pleadings, hear the testimony and the argument of counsel, and after having fully considered the same, together with the viewing in person of the motion picture "Viva Maria", is of the opinion and hereby finds that the City of Dallas, as Plaintiff, is entitled to a temporary injunction.

It is therefore the Order, Judgment and Decree of this Court, and the Court hereby grants a temporary injunction against Interstate Circuit, Inc., as Defendant, and United Artists Corporation, as Intervenor, enjoining them from exhibiting said motion picture "Viva Maria" in violation of Ordinance No. 11284, or without advertising by

Media originating within or stationary within the City of Dallas and exhibiting said film as "not suitable for young persons", and that this temporary injunction shall be effective pending a final hearing for a permanent injunction herein.

The Exceptions of the Defendant and Intervenor in the [fol. 187] pleadings are hereby specifically overruled.

The Defendant in open court, requested the Court to file its Findings of Fact and Conclusions of Law and this request is specifically denied.

The Defendant and Intervenor in open court gave notice of appeal to the Fifth Supreme Judicial District of Texas Sitting at Dallas, Texas.

Entered this the 18th day of February A. D. 1966.

A. R. Stout, Judge Presiding.

[File endorsement omitted]

[fol. 187a] Clerk's Certificates to foregoing transcript [omitted in printing].

[fol. 188]

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

18071

No. 16,773

INTERSTATE CIRCUIT, INC., et al, Appellants,

vs.

CITY OF DALLAS, Appellee.

MOTION TO ADVANCE ON THE DOCKET—
Filed March 22, 1966

To the Honorable Judge of Said Court:

Now comes the Appellant in the above styled and numbered cause, and moves the Court to advance this case for immediate submission.

As grounds therefor the Appellant would respectfully show the following:

I.

The Appellant's Brief herein was filed on Saturday, March 19, 1966, and on that same day at approximately 10:25 o'clock A.M., a copy of the Brief was delivered to the Honorable N. Alex Bickley, City Attorney.

II.

The appeal of this case involves the right of the City of Dallas to restrict the exhibition of the motion picture, "Viva Maria", under its Ordinance No. 11284. The City of Dallas having classified the picture as "not suitable for

[File endorsement omitted]

young persons", an appeal was taken from a temporary injunction of the 101st District Court, enjoining the Appellant from advertising the picture as "suitable for young persons".

[fol. 189] III.

Ordinance No. 11284, Section 46A-7(3), provides:

> "(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters."

Under the terms of the Ordinance, the City is obligated to join in this Motion to Advance on the Docket, and get a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

IV.

A copy of this Motion has been submitted to the City of Dallas prior to filing and if the space provided for their signature is endorsed by the City Attorney, then it will be considered a joint Motion of both parties. If it is not endorsed, then the Court is asked to advance the submission of the case because the Ordinance requires it even

though the City did not concur. The Brief of the City of Dallas should be filed according to the terms of the Ordinance by Thursday, March 24, 1966. This being motion day under the practice of this Court, this Motion is filed now so that when the City's Brief is filed, there will be no delays in making the request for advancement.

[fol. 190] V.

This Court is respectfully requested to advance this case to the earliest time practicable, giving particular consideration to the importance of the matter and the precedent which will be established here for other cases of this type now pending in the trial courts of Dallas County, and other cases which will probably be filed in the future.

VI.

The Appellant here is ready to argue this case at the earliest time that the Court will set the same for submission, whether on a regular day of the Court's business or at a special session.

Wherefore, Premises Considered, Appellant prays that this case be advanced on the docket and set for submission on Friday, March 25, 1966, and that an opinion on the matter be rendered at the earliest time possible.

Respectfully submitted,

Tobolowsky, Hartt, Schlinger & Blalock, By Grover Hartt, Jr., 3525 Southland Center, Dallas, Texas 75201, RI 2-9205, Attorneys for Appellant.

The City of Dallas joins in the foregoing Motion to Advance the case on the docket of the Court.

Ted P. MacMaster, City Attorney

[fol. 191] Proof of service [omitted in printing].

[fol. 192] Clerk's Certificate to foregoing paper [omitted in printing].

[fol. 193]

IN THE COURT OF CIVIL APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

18071
16773

INTERSTATE CIRCUIT, INC. et al.,

vs.

CITY OF DALLAS

ORDER GRANTING MOTION TO ADVANCE—March 24, 1966

This day came on to be heard the motion of appellants to advance submission of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be granted and oral argument is set for Monday, March 28, 1966.

IN THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

18072
16773

INTERSTATE CIRCUIT, INC. et al.,

vs.

CITY OF DALLAS

ORDER GRANTING MOTION TO EXHIBIT THE MOTION PICTURE—March 24, 1966

This day came on to be heard the motion of appellants for permission to exhibit the motion picture, "Viva Maria" involved in this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be granted, and that the motion picture in question be shown at 9:00 o'clock a.m., Monday, March 28, 1966.

[fol. 194]

IN THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, DALLAS

From a District Court of Dallas County, Texas

No. 16,773

INTERSTATE CIRCUIT, INC., et al., Appellants,

vs.

CITY OF DALLAS, Appellee.

OPINION—APRIL 5, 1966

On February 14, 1966 the City of Dallas, appellee, filed suit against Interstate Circuit, Inc., appellant, an exhibitor of commercial motion pictures, seeking temporary and permanent injunctions restraining said appellant (1) from exhibiting the film "Viva Maria" without advertising the film as "not suitable for young persons" and (2) from violating Ordinance No. 11284, as amended, by exhibiting any film contrary to the provisions of the Ordinance.

On February 16, 1966 United Artists Corporation, asserting that it is a distributor of motion pictures and is the exclusive owner of distribution rights of the film "Viva Maria", intervened in opposition to the City.

On February 18, 1966, following a hearing begun the day before, the court granted the City's prayer for a temporary injunction. The City had offered to try the case on its merits at the same time, that is, try the whole case on February 18, 1966, including the application for permanent injunction. This offer was declined by appellants.

Ordinance No. 11284 known as the "Motion Picture Classification Ordinance" was passed by the City Council of the City of Dallas on November 22, 1965. It is too long

to be copied here in its entirety. A summary of its material provisions will be found in a footnote hereto.*

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*The provisions of the ordinance which are material to this controversy may be summarized as follows:

Sec. 46A-1. Definition of Terms:

(d) A young person is defined as being any person who has not attained his sixteenth birthday.

(f) The standards to be applied in determining whether films shall be classified as "not suitable for young persons are:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

"(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extramarital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

"A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

Sec. 46A-2. Establishment of Board:

This section provides for the creation of the Dallas Motion Picture Classification Board.

Sec. 46A-3. Classification Procedure:

(a) Before exhibiting a film the exhibitor shall file a proposed classification of the film together with a resume of the plot and other information. If the Board approves the exhibitor's proposed classification it shall file its approval. If the Board fails either to file an approved classification or to hold a hearing within five days, the exhibitor's proposed classification shall be considered approved.

[fol. 195] The Ordinance itself has already been the subject of court action. A number of motion picture exhibitors filed suit in the United States District Court for the Northern

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(b) If the Board is not satisfied with the exhibitor's proposed classification, it may request an exhibition of the film before the Board at the earliest time practicable with due regard to the availability of the film. At the screening before the Board the exhibitor may appear, make such statements and present such evidence as he may desire. The Board shall file its classification within two days after such screening.

(c) Any initial or subsequent exhibitor may file an application for a change in classification. If the prior classification should be changed to "not suitable for young persons" the exhibitor shall have seven days in which to alter his advertising and audience policy.

(d) The Board shall notify all exhibitors of its classification order.

(e) The classification shall be binding on any subsequent exhibitor unless a change in classification is made.

Sec. 46A-4. Offenses:

(a) It shall be unlawful for an exhibitor (1) to exhibit a film which has not been classified; (2) and (3) to exhibit any film classified "not suitable for young persons" under sixteen years of age unless advertising and display media state that the picture is so classified; (4) and (5) knowingly to sell or give to a young person a ticket to a film classified "unsuitable for young persons", or knowingly to permit a young person to view such film.

(d) It shall be a valid defense to any prosecution or other proceeding under the Ordinance that the young person was accompanied by his parent, legal guardian, husband or wife.

Sec. 46A-5. License:

Every exhibitor holding a general motion picture license shall be entitled to issuance of a license to exhibit films classified "not suitable for young persons."

Sec. 46A-6. Revocation or Suspension of License:

Upon complaint being filed that any exhibitor has repeatedly violated the provisions of the Ordinance or has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a classified film, the City Council may after notice and hearing suspend for one year the exhibitor's license for the showing of classified pictures.

District of Texas seeking an injunction on the ground that the Ordinance itself is violative of the First and Fourteenth Amendments to the Constitution of the United States. On December 23, 1965 Honorable Sarah T. Hughes, judge of

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Sec. 46A-7. Judicial Review:

(a) Within two days after filing of the classification by the Board, any exhibitor may file a notice of nonacceptance. If the Board desires to contest the exhibitor's nonacceptance, it shall:

(1) Make application in court within three days for a temporary and permanent injunction.

(2) Have application for temporary injunction set for hearing within five days. If the exhibitor waives notice pursuant to rules of procedure and requests a hearing on the merits on the day set for the hearing on the temporary injunction, the Board shall be required to waive its application for temporary injunction and shall join in such request.

(3) In the event the exhibitor appeals the City shall reply to appellant's brief within five days.

(4) Same in substance as Paragraph (3) if application for writ is made to Supreme Court of Texas by exhibitor.

(5) If trial court denies the Board's application for injunction and Board appeals, Board shall be required to waive all periods of time allowed it by Texas Rules of Civil Procedure, file motion for new trial only if required and then within two days; shall not amend its motion and shall obtain a hearing within five days. Board shall perfect appeal to Court of Civil Appeals including filing of Transcript, Statement of Facts and brief within ten days and shall then file a motion requesting the Court of Civil Appeals to advance the submission of the appeal.

(6) If the Court of Civil Appeals reverses the trial court's injunction order, or if the court refuses to reverse the order, provisions are made similar to those outlined in Paragraph (5) above for the hearing of and decision by the Supreme Court of Texas.

Sec. 46A-10. Exception to State Law:

Nothing in Ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of Texas Penal Code.

Sec. 46A-11. Severability Clause:

Should any section of the Ordinance be held invalid such holding shall not render invalid any other section, the various sections, etc. being deemed severable for this purpose.

that court, held in effect that, though Section 46A-6 of the Ordinance is unconstitutional, the rest of the Ordinance is not violative of the Constitution. Interstate Circuit, Inc. v. City of Dallas, 249 F.Supp. 19. Appended to the opinion is Appendix A—a reproduction in full of the Ordinance. The above judgment is now pending on appeal before the United States Court of Appeals.

In the appeal now before us Section 46A-6 is not involved. No violation of that section is alleged. The City has not undertaken to suspend appellants' license and does not seek to do so. Therefore, we shall not pass on the constitutionality of Section 46A-6, which under the terms of Section 46A-11 may be treated as severable from the rest of the Ordinance.

[fol. 196] The two appellants have filed separate briefs. Interstate Circuit, Inc. in its first six points on appeal, and United Artists Corporation in all of its ten points, assert that the Ordinance and its application in this case are violative of the First and Fourteenth Amendments to the Constitution of the United States and of Article 1, Sections 8 and 19 of the Constitution of the State of Texas. We do not agree with appellants.

Of course Article 1, Sections 8 and 19 of the Constitution of the State of Texas does not override the Constitution of the United States. Therefore, we shall in the main confine our discussion to the latter Constitution and interpretations thereof, especially with reference to civil suits since this suit does not involve a criminal action, as did the case of Malone v. State of Texas, 339 SW 2d 666.

This is not a totally suppressive ordinance, or one that would totally deny the exhibition to anyone of the picture "Viva Maria" or any other classified film. It does not in any way prohibit the exhibition of any classified picture to adults. It does not even prohibit the exhibition of the picture to any child under the age of sixteen years if ac-

[fol. 197] companied by parent, guardian, husband or wife. It does not prohibit exhibitors from exhibiting pictures classified "not suitable for young persons". It does not

prohibit distributors from distributing a picture so classified. It is in the nature of a classification ordinance, the purpose of which is to regulate the exhibition of classified pictures to children.

By providing for such regulation the Ordinance does not contravene the freedom of speech provisions of our Constitutions. The Supreme Court of the United States has itself suggested that such regulation is proper. We quote from the opinion in Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 84 S.Ct. 1676:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material *deemed harmful to children.* But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population . . . *to reading only what is fit for children.*' Butler v. Michigan, 352 US 380, 383, 1 L ed 2d 412, 414, 77 S Ct 524. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at to- [fol. 198] tally prohibiting its dissemination." (Emphasis supplied.)

See also Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 88 L.Ed. 645, and People v. Walton, 161 P.2d 498.

Freedom of speech, mighty bulwark that it is in the preservation of our liberties, is not an absolute right—a truth that is recognized by court decisions. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766; and Times Film Corp. v. Chicago, 365 U.S. 43, 5 L.Ed.2d 403, 81 S.Ct. 391. We do not believe that our forefathers in adopting our constitutional provisions or that subsequent interpreters thereof intended to require of children the same discretion, the same mature judgment, or the same responsibility in sex matters that we do of adults. Freedom of speech does not include the right to

teach children that sexual promiscuity is to be approved and accepted as a standard of conduct. And to so hold is not merely to embrace a contemporary local community standard as appellants contend. It involves a contemporary national standard.

This Ordinance avoids constitutional infirmity though it provides for a prior submission of a film under some circumstances. Times Film Corp. v. Chicago, 365 U.S. 43, 5 L.Ed. 2d 403, 81 S.Ct. 391. The process under the terms of the Ordinance takes place under procedural safeguards which require that (1) the burden of proving that the film is not protected rests on the City; (2) the exhibitor is assured by the Ordinance and authoritative judicial construction that within a specified brief period of time the City will either issue a permit or go to court to obtain a regulated showing of the film; (3) any restraint in advance of final adjudication must be for the shortest period of time compatible with sound judicial resolution; and (4) the procedure must assure a prompt final judicial decision. These are the tests laid down by the Supreme Court of the United States in Freedman v. Maryland, 380 U.S. 51, 13 L.Ed. 2d 649, 85 S.Ct. 734 in a *total censorship case.*

The Texas Rules of Civil Procedure grant powers to courts to make prompt judicial decisions. In the district courts Rule 245(c) provides that actions may be placed on the trial calendar "in such other manner as the courts deem expedient" and Rule 330(b), applicable to Dallas courts, provides that "the court may set any case for trial at any time so as to allow the parties reasonable time for preparation."

[fol. 199] In the appellate courts Rule 410, after listing certain types of cases which shall have precedence in Courts of Civil Appeals then states in Section (f): "Such other cases as the court by order or rule, may direct." Rule 497 provides that "Causes may be tried in such order as the justices of the Supreme Court may deem to the best interest and convenience of the parties or their attorneys."

The case now before us was filed in the trial court February 14, 1966, tried February 18, 1966, submitted to this court March 28, 1966 and decided April 5, 1966. Appellants surely have no real basis to complain that the judicial procedural time table has been inadequate to meet the requirements set out in the Freedman case.

Appellants complain that the Ordinance leaves too much to the judgment and discretion of the Board. Appellants apparently overlook the fact that this case was not tried in the district court under the "substantial evidence rule", which requires a court to approve an administrative agency's decision if there is any substantial evidence to support it. This was a *"de novo"* trial in which the court was free to make and obviously did make its own independent findings regardless of the findings or judgment of the Board.

Appellants say that the Ordinance is invalid because it provides standards for the judgment which are too broad, vague, uncertain and indefinite to permit of enforcement or to give fair notice of the type of films which may be subject to classification. We see no such infirmity in the Ordinance. In Subsection (f) of Section 46A-1 the Ordinance sets definite standards for classification. Absolute precision is not required. What is required and what we think the Ordinance affords is a sufficiently definite warning of the standards which are to guide the Board and the courts in classifying films. As was said in Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498 (at page 1510), 77 S.Ct. 1304:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. *This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process.* '. . . The Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332

US 1, 7, 8, 91 L ed 1877, 1883, 67 S Ct 1538. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous . . .'" (Emphasis ours.)

[fol. 200] Appellants further say the Ordinance is invalid because it involves a contemporary community standard of a local community only, the City of Dallas, and not the State of Texas or the United States. Again we cannot agree with appellants. To regulate to a limited extent the portrayal to children under the age of sixteen years of sexual promiscuity as acceptable is not to apply merely a local community standard. It is to apply a contemporary national standard.

Appellants contend that to support the validity of the Ordinance or any action taken under its terms the City must prove that a film classified "not suitable for young persons" must pass three tests. We quote from the brief of the distributor, appellant United Artists Corporation:

> "1. It must deal with sex in a manner appealing to the prurient interest, judged by the average person, applying contemporary community standards, and considering its dominant theme as a whole. Roth v. United States, 344 U.S. 476, 1 L.ed.2d 1498 (1957); and, 2. It must be patently offensive—so offensive on its face as to affront community standards of decency. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 8 L.ed. 2d 639 (1962); and, 3. It must be utterly without redeeming value; hence, the good may not be weighed against the bad. Jacobellis v. Ohio, 378 U.S. 184, 12 L.ed. 2d 793 (1964)."

We bow to the pronouncements of the Supreme Court of the United States. But we do not believe that the holdings above set out are applicable here. In all of the cited cases the court was considering enactments which sought to impose total censorship. Their effect would have been to ban completely the sale, distribution or exhibiting of the matter involved either to adults or children. The Ordinance we have before us for consideration in this case does no such thing. As we have already pointed out it does not call for total censorship in any instance. It simply applies limited regulations of the conditions under which certain classified pictures may be exhibited to children under the age of sixteen years.

If we be in error in the above holding we nevertheless hold that the Ordinance and its application in this case do not violate the constitutional provisions. We have read the evidence reproduced in the statement of facts and viewed the film "Viva Maria". The latter was exhibited for our benefit in the court room. The evidence amply supports the implied findings of the Board and the district court that the film offends in all of the particulars named under the three headings quoted in the foregoing excerpt from appellant's brief.

[fol. 201] If the three tests are to be applied in this case we think test No. 1 should be modified so that in place of the words "judged by the average person" there should be subsituted the words "judged by the average *young person*" —meaning a person under the age of sixteen years. However, we would make the same holding if test No. 1 were not so modified.

In the case of John Cleland's "Memoirs of a Woman of Pleasure" vs. Attorney General of the Commonwealth of Massachusetts decided March 21, 1966, 34 "The United States Law Week" 4236, the Supreme Court of the United States reversed a judgment of a Massachusetts court banning the above named book. The court said, "A book cannot be proscribed unless it is found to be utterly without redeeming social value." But the court then went on to say:

> "It does not necessarily follow from this reversal that a determination that 'Memoirs' is obscene * * * would be improper under all circumstances. On the premise, which we have no occasion to assess, that 'Memoirs' has the requisite prurient appeal and is patently offensive, *but has only a minimum of social value,* the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected.". (Emphasis supplied.)

We hold that "Viva Maria" has only a minimum of social value, if any at all, as to children under the age of sixteen years. And since it is permitted to be exhibited subject only to limited regulations, it is not constitutionally protected from the terms of the Ordinance which the City seeks to apply or from the terms of the temporary injunction granted by the trial court.

Appellant United Artists Corporation, distributor, asserts that it has the same constitutional rights as the exhibitor, yet it is not mentioned in the Ordinance and was not notified of the hearings. There is no merit to this contention. United Artists Corporation does not claim that it is an exhibitor of this or any other picture. It is a distributor and there is nothing in the Ordinance to prevent distribution of the film. The Ordinance has to do with the exhibition of the film to children, not its distribution. Besides, United Artists Corporation intervened in the lawsuit and was given full opportunity to be heard. It has not been harmed.

We overrule the first six points on appeal of appellant Interstate Circuit, Inc. and all ten points of appellant United Artists Corporation.

In its seventh point appellant Interstate Circuit says [fol. 202] that under Article 527 of the Texas Penal Code the State pre-empted to regulation of motion pictures, so that a municipality may not enter the field. In its eighth to sixteenth points, inclusive, appellant complains of the

action of the court in overruling exceptions to appellee's pleadings. In its seventeenth point appellant objects to the court's failure to set forth reasons to justify the granting of the temporary injunction. In its eighteenth and nineteenth points appellant alleges that the temporary injunction was not supported by pleadings and the court misapplied the law. We have considered all these additional points and find no merit in them. They are overruled.

Justice Bateman has written a concurring opinion in which he presents his views somewhat in detail. I have read his concurring opinion and agree with his views as stated by him.

The judgment of the trial court is

Affirmed.

Dixon, Chief Justice.

Delivered:

April 5, 1966.

Williams, A.J., not sitting.

[fol. 203]

CONCURRING OPINION—April 5, 1966

I concur fully with everything written by my Brother Dixon in his opinion and would like to enlarge somewhat on several of the decisions contained therein.

By its seventh point of error on appeal the appellant Interstate Circuit, Inc. says the court erred in refusing to hold that Article 527 of the Texas Penal Code pre-empted the field of regulating motion pictures, thus making invalid such attempted action by the City. The first two sections of Article 527, Penal Code of Texas, as amended in 1961, prohibit the doing of certain things, including the exhibition of obscene motion pictures, but Section 5 provides, in part, as follows:

> "The provisions of this Act shall not apply to any motion pictures produced or manufactured as com-

> mercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry."

The evidence clearly shows that the film in question is what is known as a "commercial motion picture" and that it has moved, and will probably continue to move, in interstate commerce. We think we can safely assume that such movements in interstate commerce will be "legal." Therefore, this motion picture, being one of a class specifically excepted from the effect of Article 527, is subject to regulation by the City.

Moreover, the City of Dallas, being a home rule city deriving its powers from Article 11, Section 5, of the Texas Constitution, has plenary charter powers which include the power to enact the ordinance here in question, its powers being subject only to the limitation that its charter [fol. 204] and ordinances shall contain nothing inconsistent with the Texas and Federal Constitutions or the general laws enacted by the State Legislature. City of Fort Worth v. McDonald, Tex.Civ.App., 293 SW 2d 256, wr. ref. n.r.e.; Janus Films, Inc. v. City of Forth Worth, Tex.Civ.App., 354 SW 2d 597, wr. ref. n.r.e. *per curiam*, 163 Tex. 616, 358 SW 2d 589. Home rule cities have full authority to do anything the Legislature could have authorized them to do prior to adoption of the Home-Rule Amendment, the result being that it is not necessary to look to the acts of the Legislature for grants of power to such cities, but only for limitations on their powers. Forwood v. City of Taylor, 147 Tex. 161, 214 SW 2d 282, 286; Yellow Cab Transit Co. v. Tuck, Tex.Civ.App., 115 SW 2d 455, wr. ref.

Appellants take the position that in the light of certain pronouncements by the Supreme Court the picture "Viva Maria" is entitled to protection under the First and Four-

teenth Amendments to the United States Constitution and Article 1, Section 8 of the Texas Constitution unless it can be properly said that it is obscene; and that in determining whether it is obscene three tests must be applied, to wit:

> "1. It must deal with sex in a manner appealing to the prurient interest, judged by the average person, applying contemporary community standards, and considering its dominant theme as a whole. Roth v. United States, 344 U.S. 476, 1 L. ed. 2d 1498 (1957); and,
>
> "2. It must be patently offensive—so offensive on its face as to affront community standards of decency. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 8 L. ed. 2d 639 (1962); and,
>
> "3. It must be utterly without redeeming value; hence, the good may not be weighed against the bad. Jacobellis v. Ohio, 378 U.S. 184, 12 L. ed. 2d 793 (1964)."

It is my firm opinion that the constitutional guaranties of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as "not suitable for young persons" is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States Supreme Court intended, in Near v. Minnesota, 283 U.S. 697, 716, 75 L. Ed. 1357, 1367, or in any other case, to make such a stringent limitation on the powers of a state or city in this field.

The ordinance under examination, in defining the phrase "not suitable for young persons," does not employ the words "obscene" or "obscenity." The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not consider it obscene; yet, by its very adroitness or subt- [fol. 205] lety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted. Conveying to young per-

sons the idea that to be able to enjoy the pleasures of sexual gratification without being burdened with any accompanying responsibility or commitment, and with no retributive consequences, or even the slightest remorse, is acceptable behavior according to accepted standards of the American community, would in my opinion have a much more pernicious effect on the morals of the community than mere obscenities. To say that a community is powerless to protect itself and its youth from such damage because of the constitutional safeguards of free speech is to my mind unconscionable and unacceptable.

We are also asked to dissolve the temporary injunction because the order does not contain a recitation of the judge's reasons for issuing the same, as required by Rule 683, T.R.C.P. It is true that this order merely recites that all parties were represented by attorneys and in person, that they announced ready for trial and that the court, after hearing the testimony and argument of counsel, and after having fully considered the same, together with the viewing in person of the motion picture "Viva Maria", is of the opinion and finds that the appellee is entitled to a temporary injunction. The order then proceeds to grant the temporary injunction. It is also true that several Texas cases have held that this requirement of Rule 683 is mandatory and that the omission of the reasons for granting the injunction is fatal and requires reversal. Miller v. State, Tex.Civ.App., 305 SW 2d 663, no wr. hist.; Northcutt v. Waren, Tex.Civ.App., 326 SW 2d 10, wr. ref. n.r.e.; City of Houston v. Rose, Tex.Civ.App., 361 SW 2d 477, no wr. hist.

In Miller v. State, *supra*, the temporary injunction had been granted without notice to the defendant and without a hearing. There was neither pleading nor evidence that irreparable wrong, damage or injury was imminently threatened. The order did not state the reasons for its issuance. For all of these reasons the order was reversed and remanded.

In Northcutt v. Waren, *supra*, there were also additional substantial grounds for reversal.

In City of Houston v. Rose, *supra,* although the failure to state the reasons for the injunction seems to have been [fol. 206] the only ground on which the order was reversed, it was pointed out in the opinion that in several cases it had been held that the failure to set forth the reasons for granting a temporary injunction would not require a reversal "where the record affirmatively shows that no harm resulted."

It seems to be well settled by the following authorities that Rule 683 does not require a reversal when the record "affirmatively shows that no harm resulted." 31 Tex.Jur.2d, Injunctions, § 157, p. 274; O'Daniel v. Libal, Tex.Civ.App., 196 SW 2d 211, no wr. hist.; Gonzalez v. Rodriguez, Tex. Civ.App., 250 SW 2d 253, no wr. hist.; Rothermel v. Goodrich, Tex.Civ.App., 292 SW 2d 882, 884; Payton v. Hurst, etc. Clinic, Tex.Civ.App., 318 SW 2d 726, wr. ref. n.r.e. See also Transport Co. of Texas v. Robertson Transports, Inc., 152 Tex. 551, 261 SW 2d 549, and Garcia v. Sun Oil Co., Tex.Civ.App., 300 SW 2d 724, 735, wr. ref. n.r.e.

As pointed out in O'Daniel v. Libal, *supra,* "The purpose of the rule above referred to is to inform a party just what he is enjoined from doing and the reasons why he is so enjoined." It was also pointed out in that opinion that the application for temporary injunction was set down for hearing and that the appellant filed his answer, that both parties introduced several witnesses, some twenty witnesses testifying at the hearing, and that "the main and sole inquiry" was whether or not the act sought to be enjoined had or would result in a nuisance; that the appellant was familiar with the prayer of appellee's petition, had heard the statement of the court when he pronounced the judgment and that there could be "no doubt but what appellant knew what he was enjoined from doing and the reasons why."

With slight exception, the same may be said of the case at bar. Without further lengthening this opinion by reciting the evidence and the statements of the trial judge at the time he announced his decision in the presence of counsel for all parties, I would simply state that this record

does affirmatively show that no harm resulted from the failure of the judge to recite specifically in his order the reasons why he granted the temporary injunction. Certainly, it will not be argued that such omission probably caused the rendition of an improper judgment or probably prevented appellants from making a proper presentation of the case to this court. Rule 434, T.R.C.P.

Appellants and appellee are each asserting substantive [fol. 207] rights under Federal law. Appellants say the film in question is protected under the United States Constitution, while appellee asserts that the exercise of its substantive right to regulate the exhibition of the film is within the bounds of that same Constitution. Yet, we are asked to reverse this case on a purely technical, procedural rule. This we are in effect prohibited from doing by the Supreme Court of the United States in Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L. Ed. 2d 889, wherein the court said that "* * * the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Rule 683, T.R.C.P., under discussion here, is purely procedural and does not involve any substantive rights of the parties. It cannot be invoked to deny the parties, appellants and appellee, of their rights under the Constitution of the United States. For this additional reason the point is overruled.

I am fully persuaded that the temporary injunction was properly granted and that it is our duty to affirm.

Bateman, Associate Justice.

Delivered:

April 5, 1966.

[fol. 208] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 209]

IN THE COURT OF CIVIL APPEALS

FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

16773

INTERSTATE CIRCUIT, INC., et al.,

vs.

CITY OF DALLAS.

From District Court of Dallas County

JUDGMENT—Tuesday, April 5, 1966

Opinion of the Court delivered by Mr. Dixon, Chief Justice.

Concurring opinion delivered by Mr. Bateman, Associate Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellee, City of Dallas, have and recover of and from the appellants, Interstate Circuit, Incorporated, and United Artists Corporation, and from the cash deposit in the hands of the District Clerk of Dallas County, Texas, made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

Mr. Williams, Associate Justice, not sitting.

IN THE COURT OF CIVIL APPEALS

FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

18085

16773

INTERSTATE CIRCUIT, INC., et al.,

VS.

CITY OF DALLAS.

ORDER OVERRULING MOTION FOR REHEARING—
Monday, April 25, 1966

This day came on to be heard the motion of appellant Interstate Circuit, Incorporated, for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

IN THE COURT OF CIVIL APPEALS

FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

18094

16773

INTERSTATE CIRCUIT, INC., et al.,

VS.

CITY OF DALLAS.

ORDER OVERRULING MOTION FOR REHEARING—
Monday, April 25, 1966

This day came on to be heard the motion of appellant United Artists Corporation for rehearing of this cause, and

the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

[fol. 210] Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 211]

IN THE SUPREME COURT OF TEXAS

No. A-11,490

INTERSTATE CIRCUIT, INC., ET AL., Petitioners,

v.

CITY OF DALLAS, Respondent.

PETITIONER'S MOTION TO ADVANCE—
Filed June 6, 1966

To the Honorable Supreme Court of Texas:

Now comes the Petitioner, Interstate Circuit, Inc., joined by the Respondent, City of Dallas, and moves the Court to [fol. 212] advance this case for consideration on the pending Application for Writ of Error for the following reasons:

I.

The suit involves an appeal from a temporary injunction.

II.

The City of Dallas is enforcing a classification system on motion pictures. For this system to be legal, all parties recognize that a prompt judicial review is necessary.

[File endorsement omitted]

III.

By seeing this advancement on the docket, the Petitioner does not concede that the classification system, and the procedures relating thereto, provide prompt judicial review; neither does the City of Dallas concede that prompt judicial review is denied if this motion is not granted.

IV.

This case is one of several arising under the terms of the ordinance. It is important for the parties here, and for the lower courts that will deal with these other cases, both at the trial and appellate levels, to have the issues of this case determined as soon as possible, if review is to be granted.

[fol. 213]

V.

Respondent, by joining here, does not concede that Writ of Error should be granted, but simply requests that the decision on the Application be determined as soon as possible.

VI.

In the event that the Application for Writ of Error is granted, this Petitioner and the Respondent request that the submission of this case be set at the Court's earliest convenience so that a decision can be reached on this matter.

Wherefore, Premises Considered, This Petitioner, Interstate Circuit, Inc., and the Respondent, City of Dallas, pray that the Court consider the Application for Writ of Error at the earliest convenience of this Court; and, further, that if the Writ of Error be granted, that the case be set for submission at the earliest convenience of the Court.

Respectfully submitted,

Tobolowsky, Hartt, Schlinger & Blalock, By Grover Hartt, Jr., 3525 Southland Center, Dallas, Texas 75201, Riverside 2-9205, Attorneys for Petitioner, Interstate Circuit, Inc.

[fol. 214] N. Alex Bickley, 501 City Hall, Dallas, Texas, Riverside 8-9711, Attorney for Respondent, City of Dallas.

Proof of Service (omitted in printing).

[fol. 215] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 216]

IN THE SUPREME COURT OF TEXAS

No. A-11,490

INTERSTATE CIRCUIT, INC., et al.,

vs.

CITY OF DALLAS.

From Dallas County, Fifth District

ORDER REFUSING THE APPLICATIONS FOR WRITS OF ERROR—
July 27, 1966

Application of Interstate Circuit, Inc. and application of United Artists Corporation for writs of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the applications present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicants, Interstate Circuit, Inc., and United Artists Corporation pay all costs incurred on their respective applications.

[fol. 217] Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 218]

IN THE SUPREME COURT OF TEXAS

No. A-11,490

INTERSTATE CIRCUIT, INC., ET AL., Petitioners,

v.

THE CITY OF DALLAS, Respondent.

SUPPLEMENTAL MOTION FOR REHEARING—
Filed September 30, 1966

(omitted in printing)

• • • • • • • •

[fol. 219]

ATTACHMENT TO SUPPLEMENTAL MOTION FOR REHEARING

(See opposite) ☞

CHART OF TEN CASES BEFORE AND AFTER INTERSTATE CIRCUIT, INC., ET AL. V. CITY OF DALLAS, CAUSE NO. A-11490

1. No.	2. S. Ct. No.	3. Style/Southwest Citation	4. Nature of Suit	5. Filed in S. Ct.	6. S. Ct. Action	7. Date	8. Lapsed Time Between Filing	9. Set for Submission	10. Motion for Rehearing Overruled
1.	A-11480	Phillips et al. v. Parrish et al., 401 S. W. 2d 347	Declaratory Judgment	5-19-66	Ref. N. R. E.	7-27-66	69 Days		
2.	A-11481	Roberts et ux. v. Hodges, 401 S. W. 2d 332	Suit on Okla. Judgment	5-23-66	Ref. N. R. E.	6-29-66	37 Days		
3.	A-11482	Petty v. Texas Employers Insurance Association, 401 S. W. 2d 678	Workmen's Compensation	5-23-66	Ref. N. R. E.	6-22-66	30 Days		7-20-66
4.	A-11483	Head v. City of Shore Acres, et al., 401 S. W. 2d 703	Compel Issuance of Permit	5-23-66	Ref. N. R. E.	6-15-66	23 Days		
5.	A-11484	Walton et al. v. Hardy, 401 S. W. 2d 614	Partition Suit	5-23-66	Ref. N. R. E.	6-15-66	23 Days		7-13-66
6.	A-11485	Flores et al. v. Great American Insurance Co., 401 S. W. 2d 690	Workmen's Compensation	5-23-66	Ref. N. R. E.	7-27-66	65 Days		
7.	A-11486	Universal Underwriters Ins. Co. v. Bounds, 401 S. W. 2d 865	Workmen's Compensation	5-23-66	Ref. N. R. E.	6-29-66	37 Days		
8.	A-11487	Moulton et al. v. Alamo Ambulance Service, 402 S. W. 2d 200	Personal Injury	5-23-66	Granted	7-27-66	65 Days	10-19-66	
9.	A-11488	Sanders v. Dunlap, 401 S. W. 2d 367	Trespass to Try Title	5-23-66	Ref. N. R. E.	6-15-66	23 Days		
10.	A-11489	Forristall et al. v. Federal Insurance Co., et al., 401 S. W. 2d 285	Declaratory Judgment	5-23-66	Ref. N. R. E.	7-27-66	65 Days		

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1. No.	2. S. Ct. No.	3. Style/Southwest Citation	4. Nature of Suit	5. Filed in S. Ct.	6. S. Ct. Action	7. Date	8. Lapsed Time Between Filing	9. Set for Submission	10. Motion for Rehearing Overruled
11.	A-11490	Interstate Circuit, Inc., et al. v. City of Dallas, 402 S.W.2d 770	Temporary Injunction - Free Speech	5-23-66	Ref. N.R.E.	7-27-66	65 Days		Pending
12.	A-11491	Texas & Pacific Railway Co. v. ~~Hardgrave, et al.~~ McCleery, 401 S.W.2d 693	Personal Injury	5-23-66	Granted	7-27-66	65 Days	10-26-66	
13.	A-11492	Pierce v. Ford Motor Company, 401 S.W.2d 355	Damage - Warranty Suit	5-24-66	Dismissed	6-22-66	29 Days		
14.	A-11493	National Life & Accident Insurance Co. v. Morris, 402 S.W.2d 297	Insurance Policy	5-24-66	Ref. N.R.E.	6-29-66	36 Days		
15.	A-11494	Busse v. Sovereign Life Ins. Co., 401 S.W.2d 926	Insurance - Personal Injury	5-25-66	Ref. N.R.E.	6-29-66	35 Days		7-20-66
16.	A-11495	State v. Nelson et vir., 401 S.W. 2d 880	Condemnation Proceeding	5-26-66	Ref. N.R.E.	7-27-66	62 Days		
17.	A-11496	Barrie et vir. v. Costello et vir., 401 S.W.2d 707	Habeas Corpus Child Custody	5-27-66	Ref. N.R.E.	7-27-66	61 Days		
18.	A-11497	Roark v. Texas Municipal Retirement System, 401 S.W.2d 913	Require Pension Payments	5-27-66	Ref. N.R.E.	7-27-66	61 Days		
19.	A-11498	International Motorist Assn. v. Aguilar, 402 S.W.2d 516	Recover Attorney Fees	5-30-66	Still Pending				
20.	A-11499	Waco Transit Corp. et al. v. Transport Workers Union of America, Local No. 276 et al., 402 S.W.2d 253	Arbitration-Collective Bargaining	5-31-66	Ref. N.R.E.	7-27-66	57 Days		

[fol. 221]

1. No.	2. S. Ct. No.	3. Style/Southwest Citation	4. Nature of Suit	5. Filed in S. Ct.	6. S. Ct. Action	7. Date	8. Lapsed Time Between Filing	9. Set for Submission	10. Motion for Rehearing Overruled
21.	A-11500	City of Houston v. Fore, 401 S.W.2d 921	Street Paving Assessment	5-31-66	Granted	7-27-66	57 Days	10-26-66	

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, GEO. H. TEMPLIN, Clerk of The Supreme Court of Texas, the same being a court of record, in the performance of the functions of my office, hereby certify that I am the lawful possessor and keeper and have legal custody of the papers and records of said Court, and I further certify and attest that the above and foregoing chart, consisting of three (3) pages, including the page to which this certificate is attached, accurately and correctly shows the court number and style of the respective case, the nature of the suit, the date of the filing of application for writ of error in The Supreme Court of Texas, the action by the court, and the date thereof, and for those cases where a writ of error was granted, the date the same was set for submission, and where a motion for rehearing was overruled, the date of that action. This information shown in Columns 2, 3, ~~4~~, 5, 6, 7, 9, and 10, has been verified by an examination of the records of each of the respective cases on file and of record in my office.

(SEAL)

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court, at my office in the City of Austin in the County of Travis, State of Texas, this 9th day of September, 1966.

/s/ Geo. R. Templin
Clerk of The Supreme Court of Texas
By /s/ Garson R. Jackson
Deputy

[fol. 222]

IN THE SUPREME COURT OF TEXAS

No. A-11,490

INTERSTATE CIRCUIT, INC., et al.,

vs.

CITY OF DALLAS.

From Dallas County, Fifth District

ORDER OVERRULING THE MOTIONS FOR REHEARING—
October 19, 1966

Motions of petitioners for rehearing of their applications for writs of error having been duly considered, it is ordered that said motions be, and hereby are, overruled.

[fol. 223]

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT DALLAS
Cause No. 16773

INTERSTATE CIRCUIT, INC. ET. AL., Appellants,

vs.

CITY OF DALLAS, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 11, 1967

I. Notice is hereby given that Interstate Circuit, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals For The Supreme Judicial District of Texas Sitting at Dallas affirming judgment of the trial court entered in this action on April 5, 1966.

This Appeal is taken pursuant to 28 U.S. Code §1257(2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of pleadings filed in the District Court containing, among other things, the following:

a. Plaintiff's Original Petition.

b. Answer in Intervention of United Artists Corporation.

[File endorsement omitted]

c. Defendant's Original Answer.

d. Trial Amendment (by the Plaintiff).

e. Motion to Strike Answer in Intervention.

[fol. 224]

f. Plaintiff's First Supplemental Petition.

g. Temporary Injunction.

h. Motion to Send Original Exhibits as part of Record to Court of Civil Appeals.

i. Order to Send Exhibits in Original Form.

2. Supplemental Transcript.

3. Statement of Facts.

4. Opinion and Concurring Opinion of the Court of Civil Appeals.

5. Judgment of the Court of Civil Appeals.

6. Motions for Rehearing.

7. Order Overruling Motion for Rehearing.

8. Petitions for Writ of Error.*

9. Transmittal letter to Honorable George H. Templin, Clerk of the Supreme Court of Texas from Justin G. Burt.

10. Motion to Advance Submission to Supreme Court.*

11. Order of the Supreme Court of Texas refusing Petition for Writ of Error.*

12. Motion for Rehearing in Supreme Court by Interstate Circuit, Inc.*

13. Motion for Rehearing by United Artists Corporation, Inc.*

14. Reply to Motions for Rehearing.*

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* These items are furnished as a separate certificate from the Clerk of the Supreme Court of Texas.

15. Order of the Supreme Court of Texas overruling Motions for Rehearing on Petitions for Writ of Error.*

16. Chart of Ten Cases Before and After *Interstate Circuit Inc., Et Al.* v. *City of Dallas,* Cause No. A-11490, certified by George H. Templin, Clerk of the Supreme Court of Texas.

17. This notice of Appeal.

[fol. 225] III. The following questions are presented by this Appeal:

1. Whether Ordinance 11284 is unconstitutional because it does not guarantee a prompt final judicial decision to review actions of the Dallas Motion Picture Classification Board in classifying a motion picture as "not suitable for young persons"?

2. Whether Ordinance 11284 is unconstitutional because it prohibits the free exhibition of motion pictures on standards that are vague and ambiguous instead of limiting the restraint on free exhibition to those pictures which are obscene as that term has been defined by this Court?

3. Whether the Dallas Motion Picture Classification Board and the lower courts each applied unconstitutional standards in classifying the motion picture *Viva Maria* as "not suitable for young persons"? As sub-parts of this question, (a) it should be determined whether members of the Dallas Motion Picture Classification Board use the term "sacrilegeous" as a basis for determining that the picture was "not suitable for young persons"; (b) whether the members of the Classification Board used the geographic area of the City of Dallas in determining the community standard; and, (c) whether the members of the Classification Board based their conclusion that the

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* These items are furnished as a separate certificate from the Clerk of the Supreme Court of Texas.

Picture was not suitable upon a few isolated scenes and not on the dominant theme of the picture considered as a whole.

Tobolowsky, Hartt, Schlinger & Blalock, by Grover Hartt, Jr. and By Edwin Tobolowsky, 3525 Southland Center, Dallas, Texas, Attorneys for Interstate Circuit, Inc.

[fol. 226] Proof of Service (omitted in printing).

[fol. 227] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 228]

IN THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

No. 16,773

INTERSTATE CIRCUIT, INC., ET AL, Appellants,

v.

CITY OF DALLAS, Appellee.

NOTICE OF APPEAL OF UNITED ARTISTS CORPORATION TO THE SUPREME COURT OF THE UNITED STATES—Filed January 16, 1967

I.

Notice is hereby given that United Artists Corporation, Intervenor in the trial court and an Appellant in the Court of Civil Appeals, hereby appeals to the Supreme Court

[File endorsement omitted]

of the United States from the final Judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas entered on April 5, 1966, which Judgment was denied review by the Supreme Court of Texas finally on October 19, 1966.

This appeal is taken pursuant to 28 U.S. Code #1257(2).

II.

The Clerk of said Court will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. Rejoinder of Petitioner United Artists Corporation to Respondent City of Dallas' Brief in Reply to Application for Writ of Error;

B. Supplemental Motion for Rehearing of Application of United Artists Corporation for Writ of Error; and,

[fol. 229] C. This Notice of Appeal.

III.

The following questions are presented by this appeal:

A. Whether the Dallas Motion Picture Classification Ordinance (No. 11,284) is unconstitutional under the First Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment thereto, by restricting freedom of expression on grounds other than obscenity;

B. Whether the vague, over-broad and indefinite standards for classification of a motion picture as "not suitable for young persons" contained in the Dallas Motion Picture Classification Ordinance (No. 11,284) render said Ordinance unconstitutional under the due

process provisions of the Fourteenth Amendment to the United States Constitution;

C. Whether the Dallas Motion Picture Classification Ordinance (No. 11,284), establishing, as it does, a prior restraint on freedom of expression, contains adequate procedural safeguards to avoid unconstitutionality under the due process provisions of the Fourteenth Amendment and the freedom of expression provisions of the First Amendment to the United States Constitution;

D. Whether exhibition of the motion picture "VIVA MARIA" has been restricted, despite the holding that it has a "minimum of social value" for young persons, by the application of unconstitutional standards in conflict with the First Amendment to the United States Constitution; and,

E. Whether the procedural safeguards of the Dallas Motion Picture Classification Ordinance (No. 11,284) were constitutionally applied under the First and Fourteenth Amendments to the United States Constitution in restricting exhibition of the motion picture "VIVA MARIA."

[fol. 230] Dated this 16th day of January, 1967.

Paul Carrington, Dan McElroy, 1700 Mercantile Bank Building, Dallas, Texas 75201.

Of Counsel:

Carrington, Johnson & Stephens, 1700 Mercantile Bank Building, Dallas, Texas 75201.

Proof of Service (omitted in printing).

[fol. 231] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 232]

SUPREME COURT OF THE UNITED STATES

Nos. 1109 and 1155, October Term, 1966

INTERSTATE CIRCUIT, INC., Appellant,

v.

CITY OF DALLAS, and

UNITED ARTISTS CORPORATION, Appellant,

v.

CITY OF DALLAS.

Appeals from the Court of Civil Appeals of the State of Texas, Fifth Supreme Judicial District.

ORDER NOTING PROBABLE JURISDICTION—May 15, 1967

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument.

SUPREME COURT, U.S.
MAR 8 1967
JOHN F. DAVIS, CLERK

No. ~~1109~~ 56

In the

Supreme Court of the United States

OCTOBER TERM, 1966

INTERSTATE CIRCUIT, INC., et al.,
Appellant,

v.

CITY OF DALLAS,
Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

JURISDICTIONAL STATEMENT

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No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1966

INTERSTATE CIRCUIT, INC., et al.,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

JURISDICTIONAL STATEMENT

Appellant, Interstate Circuit, Inc., appeals from the Judgment of the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, Sitting at Dallas, which was entered on April 5, 1966, affirming a Temporary Injunction awarded to the City of Dallas by a Dallas District Court. The Texas Supreme Court refused the Application for Writ of Error with the notation of "Writ Refused, No Reversible Error". Appellant Interstate submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, Sitting at Dallas, is reported in 402 S.W. 2d 770, and is found herein at Appendix A, p. 1. The judgment of the District Court is not reported but is included in Appendix C, p. 19.

JURISDICTION

This suit was brought by the City of Dallas, seeking a Temporary Injunction to affirm the decision of the Dallas Motion Picture Classification Board, which had classified the motion picture, *Viva Maria*, as "not suitable for young persons". This Board was created by Dallas City Ordinance 11284, (Appendix B, p. 5), and purported to act under the authority granted to it by this ordinance. The judgment of the District Court, affirming the decision of the Board, was entered on February 18, 1966. (Appendix C, p. 20). The judgment entered that day included a Notice of Appeal by Interstate, and within the time prescribed by law, the case was brought before the Court of Civil Appeals. That court, on April 5, affirmed the judgment of the District Court. (Appendix A, p. 1).

Following the judgment of the Court of Civil Appeals, Appellant filed its Motion for Rehearing which was overruled on April 25, (Appendix C, p. 25), and on May 19, the Appellant filed its Petition for Writ of Error to the Supreme Court of Texas with the clerk of the Court of Civil Appeals, who sent the record to the Texas Supreme Court on May 20. (Appendix C, p. 2).

This Petition was received and filed by the Supreme Court of Texas on May 23, and the City of Dallas mailed its Reply on May 31.[1]

The Supreme Court of Texas denied the Petition for Writ of Error with endorsement "Writ Refused, n.r.e." on July 27. (Appendix C, p. 29). Pursuant to the Rules of Civil Procedure in the Texas Court, Appellant filed its Motion for Rehearing on August 10, (Appendix C, p. 30) and thereafter, on September 30, filed a Supplemental Motion. (Appendix C, p. 39). The Motions for Rehearing were overruled by the Texas Supreme Court on October 19, 1966. (Appendix C, p. 45)

The jurisdiction of the Supreme Court to review this decision by direct appeal is established by Title 28, U.S. Code, Secton 1257 (2), (1948).

QUESTIONS PRESENTED

1. Whether Dallas City Ordinance 11284 is unconstitutional because it does not guarantee a prompt final judicial decision to review actions of the Dallas Motion Picture Classification Board in classifying a motion picture as "not suitable for young persons"?

2. Whether Dallas City Ordinance 11284 is unconstitutional because it prohibits the free exhibition of motion pictures on standards that are vague and ambiguous instead of limiting the restraint on free exhibition to those pictures which are obscene as that term has been defined by this Court?

[1] See Chronology Table, Appendix C, p. 2, Item 26.

3. Whether the Dallas Moton Picture Classification Board and the lower courts each applied unconstitutional standards in classifying the motion picture, *Viva Maria*, as "not suitable for young persons"? As sub-parts of this question, it should be determined, (a) whether members of the Dallas Motion Picture Classification Board used the term "sacrilegious" as a basis for determining that the picture was "not suitable for young persons"; (b) whether the members of the Classification Board used the geographic area of the City of Dallas in determining the community standard; and, (c) whether the members of the Classification Board and trial court based their conclusion that the picture was not suitable upon a few isolated scenes rather than considering the dominant theme of the picture as a whole.

STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, Article I, Section 8, of the Texas Constitution, Article 527 of the Texas Penal Code, and Dallas City Ordinance No. 11284 are involved in this case. These are set forth in Appendix B.

STATEMENT

This suit involves the motion picture, *Viva Maria*, and the classification of this picture as "not suitable for young persons", by the City of Dallas under the provisions of Ordinance No. 11284. This classification results in a partial censorship of the movie here in question.

The parties to this appeal are Interstate Circuit, Inc., a corporation engaged in the exhibition of commercial motion pictures in Dallas and other Texas cities, United Artists, Inc., Intervenor, a corporation engaged in the distribution of commercial motion pictures in Dallas and other Texas cities, as appellants, and the City of Dallas as appellee. The ordinance in question is Dallas City Ordinance No. 11284.

Dallas City Ordinance No. 11284 was passed on November 22, 1965. (Appendix B, p. 5). The ordinance created the Dallas Motion Picture Classification Board, and gave the board certain standards for determining whether a motion picture was "suitable" or "not suitable for young persons". (Appendix B, p. 8). A young person was defined as one under sixteen years of age. In deference to the standards set forth in *Freedman v. State of Maryland*, 380 U.S. 51, (1965), there was included in the ordinance a section entitled "Judicial Review." (Appendix B, p. 16). The ordinance requires the City to file responsive pleadings within a period of time less than allowed by the Texas Rules of Civil Procedure and to join with the exhibitor in motions asking trial and appellate courts to advance the case. (Appendix B, pp. 16-19).

The present case arises under the ordinance. There is a Chronology Table included in the Appendix showing the dates that relevant events transpired. This chart reflects that prior to February 14, Interstate applied for a license to exhibit *Viva Maria* for a general audience, and that after a hearing, the picture was classified as "not suitable for young persons". A notice of non-acceptance was filed by Interstate, and on February 14, the present suit was brought by the City of Dallas. (Appendix C, p. 4).

In response to the City's petition, Interstate filed an Answer and Cross-Action (Appendix C, p. 8), raising the constitutional questions that (1) the ordinance establishes a system of prior restraint and censorship of communication, (2) the terms for classifying motion pictures provided in the ordinance are vague and indefinite, and not limited to obscenity, and (3) the ordinance does not provide for a prompt, final judicial determination as to the validity of the classification. In further answer, Interstate pleaded that commercial motion pictures are protected by Article 527 of the Texas Penal Code. (Appendix C, pp. 9-13, Defendant's Answer, Paragraph VI, (1), (2), (3), and (7), and Paragraph VII). As Cross-Plaintiff, Interstate sought injunctive relief against the enforcement of the ordinance, and a judgment to declare it invalid, raising the same points. (Paragraph XII and XIV, and Prayer, Section 2, 3, and 4, Appendix C, pp. 13-14).

At the conclusion of the trial, the City was awarded a temporary injunction against Interstate, prohibiting the showing of the motion picture, *Viva Maria*, without the notation that it is "not suitable for young persons". From this judgment, Interstate appealed. Following a Motion to Advance, in which the City joined, the Court of Civil Appeals set the case for hearing on March 28, (Appendix C, p. 21) and on that day, the court viewed the picture and heard oral argument. Its judgment affirming the temporary injunction, together with written opinion and a concurring opinion, was rendered on April 5. A Motion for Rehearing by Interstate re-urged the identical points of the first brief. (Appendix C, p. 22). This motion was overruled on April 25.

On May 19, Interstate filed its Petition for Writ of Error to the Supreme Court of Texas.[2] The Petition for Writ of Error brought forward the same constitutional points urged in the Court of Civil Appeals, asking the Supreme Court of Texas to give relief on these grounds. (Appendix C, p. 25). The City filed its Reply with the Clerk of the Supreme Court, mailing the same on May 31, (Chronology Table), and on June 6, the City and Interstate filed a joint Motion with the Supreme Court of Texas, asking that this case be advanced for submission. (Appendix C, p. 27). No action appears to have been taken by the Court on the Motion to Advance, and on July 27, the Petition for Writ of Error was denied with the endorsement "Writ Refused, No Reversible Error (Appendix C, p. 29), which is an action provided for by Rule 483 of the Texas Rules of Civil Procedure.

On August 30, Interstate filed its Motion for Rehearing. (Appendix C, p. 30).[3]

A Supplemental Motion for Rehearing was filed by Interstate on September 30, 1966, presenting to the Texas Supreme Court the "Chart of Ten Cases Before and After *Interstate Circuit, Inc. v. City of Dallas*", showing a summary of docket notations of cases in that court at the time the *Viva Maria* case was on appeal. (Appendix C, p. 39). This motion for rehearing was overruled on October 19. The Texas

[2] The petition was filed with the Clerk of the Court of Civil Appeals on this date; he mailed it to the Clerk of the Supreme Court who filed it May 23. (See Chronology Table, Appendix C. p. 2.)

[3] On August 30, 1966, the United States Court of Appeals for the Fifth Circuit rendered its opinion in *Interstate Circuit, Inc. v. City of Dallas, 366 F. 2d 590*, affirming the District Court decision and citing the endorsement of the Texas Supreme Court, "Writ Refused, n.r.e." in the present case. (p. 601).

Supreme Court refused to take jurisdiction of the case, causing the judgment of the Court of Civil Appeals to become final; and from that judgment, this appeal has been taken.

The Supreme Court of Texas denied the Petition for Writ of Error and affirmed the judgment of the Court of Civil Appeals without viewing the motion picture. (Motion for Rehearing, Appendix C, p. 30).

There is no contention that the City was in default under the terms of this ordinance in responding to any pleading, or taking any action. The specific contention is that a prompt, final judicial determination of the action of the censor is not accorded to the exhibitor.

The City of Dallas passed Ordinance 10963 on April 5, 1965, which provided for the classification of motion pictures. Interstate, along with others, brought suit in the United States District Court, *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906 (N.D. Tex. 1965), seeking to have this ordinance declared unconstitutional. This ordinance was similar to the one involved in this case, but provided an age limit of eighteen years, and a slightly different system of judicial review. On November 9, 1965, the ordinance was declared unconstitutional by the District Court, primarily on the grounds that it did not provide for a prompt, final, judicial determination of the action of censor.

Dallas City Ordinance 11284 was passed on November 22, 1965. Interstate, together with other exhibitors, again brought suit in the United States District Court, *Interstate Circuit*,

Inc. v. City of Dallas, 249 F. Supp. 19 (N.D. Tex. 1965), seeking an injunction against the enforcement of the ordinance and a judgment declaring it to be unconstitutional.

The United States District Court found that the ordinance was not invalid when its terms were construed to permit the classification of movies when they are "obscene when viewed by an audience of young persons." (p. 24) The District Court also held that the system of judicial review provided by the ordinance would give the exhibitors a final judicial determination by the Supreme Court of Texas within thirty-five days after suit was filed in the State District Court. (p. 23) The ordinance did not become effective until January 20, 1966, because of a stay order issued by the District Court. Following the judgment of the trial court in that case, the exhibitors and the City appealed, *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590 (5th Cir. 1966), and from the judgment of that court, have now sought certiorari in a proceeding styled *Interstate Circuit, Inc., et al. v. City of Dallas, Cause No. 971*, and Reverse Title, Cause No. 978, presently pending before this court.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents several important constitutional questions. This most important of these questions turns upon an interpretation of *Freedman v. State of Maryland*, 380 U.S. 51 (1965), which is understood to require that any system of censorship must provide a prompt, final, judicial determination that the action of the censor board is correct. In this case, the motion picture, *Viva Maria*, was classified "not suit-

able for young persons". The City filed suit on February 14, 1966, seeking a temporary injunction affirming this classification. Two hundred forty-seven days later, on October 19, 1966, the Texas Supreme Court overruled Interstate's Motion for Rehearing which made the judgment of the Court of Civil Appeals final. That judgment affirmed the decision of the trial court granting a temporary injunction prohibiting the exhibition of the picture to persons under sixteen years of age.

The Texas Supreme Court did not specifically affirm the decision, but gave the Court of Civil Appeals opinion an endorsement "Writ Refused, No Reversible Error." (Tex. Rul. Civ. Proc. 483). This notation indicates some error in the opinion of the Court of Civil Appeals.

Interstate attacked the ordinance here on the grounds that it did not provide a prompt, final, judicial determination as to the validity of the classification. Approximately nine months appears to be an unreasonable time to wait for a decision on any form of censorship. What is a reasonable time for prompt judicial review is of importance to the motion picture industry both in general and in Texas, as is demonstrated by this case. It is a question of general importance. *United States v. One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889 (2d Cir. 1966). It may be unwise to give a precise number of days as a minimum period for prompt judicial review, but the Texas judicial system does not provide a special trial and appellate procedure for censorship cases similar to that passed on by Maryland cases. *Trans-Lux Distribution Corp. v. Maryland State Board of*

Censors, 240 Md. 98, 213 A. 2d 235 (1965). In the case arising under Ordinance No. 10963, the first classification ordinance passed by the City of Dallas, the United States District Court said:

> "Regardless of whether the injunction provided for in Section 46A-7 of the Ordinance involved herein is interpreted as temporary or permanent, there being no provision in the Texas statutes for prompt judicial review in the trial and appellate courts, and experience being that risk of delay is built into the Texas procedure, the Ordinance in question lacks sufficient procedural safeguards designed to obviate the dangers of a censorship system. (Citing cases)".

Interstate Circuit, Inc. v. City of Dallas, 247 F. Supp. 906, 911 (1965). This opinion, rendererd November 9, 1965, declared Ordinance No. 10963 to be unconstitutional.

Ordinance No. 11284, under which the present case arises, was passed on November 22, 1965. The legislature was not in session, and no decision of a Texas appellate court changed the accuracy of this finding made in the first case between these dates. The present ordinance was found to provide a system of review that satisfied Freedman's requirements. *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19 (N.D. Tex. 1965). The court held that a final decision on a case under this ordinance could be obtained in thirty-five days. (p. 23).

This decision was appealed, and is presently before this court, but it was cited as authority by the Texas courts in dealing with *Viva Maria*.

Jacobellis v. State of Ohio, 374 U.S. 184 (1964), teaches that this Court must review the subject matter in censorship cases in making an independent judgment as to whether it is obscene or constitutionally protected.

The *Jacobellis* decision should have been followed by the Texas Supreme Court, but it denied the writ of error and overruled the motion for rehearing without seeing the motion picture. (Appendix C, p. 45). The Texas Court followed its precedent of *Janus Films, Inc. v. City of Fort Worth*, 163 Tex. 616, 358 S.W. 2d 589 (1962), where it refused to grant a writ of error in a similar case, stating that the purpose of a temporary injunction is to preserve the status quo, and that to have granted the petitioner in *Janus* the relief sought would have rendered the question moot, thereby defeating the purpose of a temporary injunction.

The holding in *Janus* was perhaps erroneous in 1962. It was certainly shown to be erroneous in 1964 by the decision in *Jacobellis*.

The ruling by the Texas Supreme Court has the practical effect of making the decision of the Court of Civil Appeals final, notwithstanding the fact that a temporary injunction is ordinarily not a final judgment. *Furr's, Inc. v. United Specialty Advertising Company*, 385 S.W. 2nd, 456 (Tex. Civ. App. 1961) error ref. n.r.e., cert. denied, *United Specialty Advertising Company v. Furr's, Inc.*, 382 U.S. 824 (1965), held that where testimony was fully developed in a temporary injunction proceeding, the findings from such proceedings become the law of the case, if not *res judicata*, in a subsequent trial for a permanent injunction and damages. As a result of the

holding in *Furr's*, the City has won in the Texas judicial system insofar as this case is concerned. If Interstate should seek a trial on the merits asking that the temporary injunction be dissolved and that the picture be held "suitable for young persons", the trial and the Court of Civil Appeals must see the picture again, if technical procedure is to be followed. There is no reason to think that either of the courts would have a different opinion. There is little hope that the Texas Supreme Court would grant a writ of error. This would be a complete exercise in futility because in this kind of case, there is logical reason to believe that the former ruling would be held to be *res judicata*, or the law of the case. It would be too burdensome to try this entire case a second time.

Denying a writ of error on the grounds of *Janus* is denying judicial review altogether; denying the writ of error without determining whether it is protected material under the First Amendment continues a procedure that violates the teaching of *Jacobellis*. By avoiding a decision in this case, The Texas Supreme Court relegates censorship cases to this court for screening and determination and places any interested party, whether exhibitor or distributor, under the burden of the delay and expense which is necessary to invoke the jurisdiction of this Court.

Ordinance 11284 provides standards for classifying motion pictures in Section 46A-1(f) where "not suitable for young persons" is defined. (Appendix B, p. 8). This language uses such terms as *brutality, criminal violence, or depravity, sexual promiscuity*, etc., and directs the Board to determine whether the "*harmful effects* outweigh artistic or educational

values***". (emphasis supplied) The United States District Court opinion in *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19 (N.D. Tex. 1965), which held that this standard was valid to the extent that such films are obscene when viewed by an audience of young people, was cited to all Texas courts considering the *Viva Maria* case. They chose to apply the language of the ordinance as written, rather than as construed by the Court in that case.

Although "sacrilegious" as a standard for censorship had been held unconstitutional in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952), John Gilliland, a Vice-Chairman of the board, said that some scenes approved violence by the clergy; and that while he did not consider this sacrilegious, it entered into the board's decision. (Appendix C, p. 15). Reverend Maceo, a member of the Board, would not adopt the word "sacrilegious", but he said that, in his opinion, the treatment accorded the clergy in these scenes was "mockery". (Appendix C, p. 18).

The only contemporary community standard that he applied was that of the City of Dallas (Appendix C, p. 17), even though a national standard of decency had been established by this Court in *Manuel Enterprise, Inc. v. Day*, 370 U.S. 478, 488 (1962), and affirmed in *Jacobellis, supra*, (192-195).

In 1961, Article 527 of the Texas Penal Code established a contemporary community standard as including a geographic area not less than the State of Texas. (Appendix B, p. 3). Both Federal and State standards were disregarded in limiting the geographic area to the Dallas community.

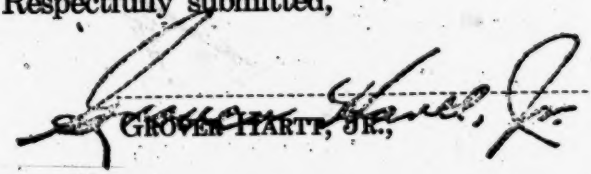
At the conclusion of the trial, the district judge said:

> "* * * there are two or three features in this picture that look to me would be unsuitable to (for) young people * * *. So I enjoin the exhibitors * * *." (Appendix C, pp. 18-19).

The granting of a temporary injunction, and the finding that the picture was "not suitable for young persons" was based on a decision contrary to *Roth v. United States*, 354 U.S. 476, 489 (1954), and the many cases which have construed it. Also, it is directly contrary to Judge Hughes' opinion which announced a definition of obscene for young persons. *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19, 24 (N.D. Tex. 1965.)

The errors discussed above bear directly on the right of free communication. They are obviously material and thereby constitute an abuse of discretion in the judgments which held *Viva Maria* "not suitable for young persons".

Respectfully submitted,



GROVER HARTT, JR.,

EDWIN TOBOLOWSKY,

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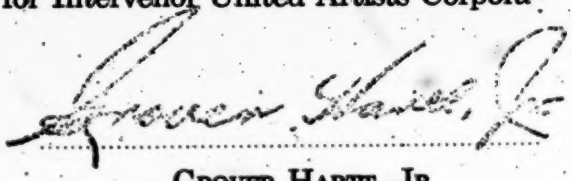
CERTIFICATE OF SERVICE

A copy of this appeal is being mailed to Mr. N. Alex Bickley, City Attorney, Municipal Building, Dallas, Texas, Attorney for the Appellee, and Mr. Paul Carrington, Mercantile Bank Bldg., Attorney for Intervenor United Artists Corporation.



GROVER HARTT, JR.

APPENDIX A

Interstate Circuit, Inc. v. City of Dallas, 402 S.W. 2d 770 (Tex. Civ. App. 1966) error ref., n.r.e.

On February 14, 1966 the City of Dallas, appellee, filed suit against Interstate Circuit, Inc., appellant, an exhibitor of commercial motion pictures, seeking temporary and permanent injunctions restraining said appellant (1) from exhibiting the film "Viva Maria" without advertising the film as "not suitable for young persons" and (2) from violating Ordinance No. 11284, as amended, by exhibiting any film contrary to the provisions of the Ordinance.

On February 16, 1966 United Artists Corporation, asserting that it is a distributor of motion pictures and is the exclusive owner of distribution rights of the film "Viva Maria", intervened in opposition to the City.

On February 18, 1966, following a hearing begun the day before, the court granted the City's prayer for a temporary injunction. The City had offered to try the case on its merits at the same time, that is, try the whole case on February 18, 1966, including the application for permanent injunction. This offer was declined by appellants.

Ordinance No. 11284 known as the "Motion Picture Classification Ordinance" was passed by the City Council of the City of Dallas on November 22, 1965. It is too long to be copied here in its entirety. A summary of its material provisions will be found in a footnote hereto.*

* The provisions of the ordinance which are material to this controversy may be summarized as follows:
Sec. 46A-1. Definition of Terms:
(d) A young person is defined as being any person who has not attained his sixteenth birthday.

The Ordinance itself has already been the subject of court action. A number of motion picture exhibitors filed suit in the United States District Court for the Northern District of Texas seeking an injunction on the ground that the Ordinance itself is violative of the First and Fourteenth Amendments to the Constitution of the United States. On December 23, 1965 Honorable Sarah T. Hughes, judge of that court, held in effect that, though Section 46A-6 of the Ordinance is unconstitutional, the rest of the Ordinance is not violative of the Constitution. Interstate Circuit, Inc. v. City of Dallas, 249 F. Supp. 19. Appended to the opinion is Appendix A—a reproduction in full of the Ordinance. The above judgment is now pending on appeal before the United States Court of Appeals.

(f) The standards to be applied in determining whether films shall be classified as "not suitable for young persons are:

"(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

"(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

"A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

In the appeal now before us Section 46A-6 is not involved. No violation of that section is alleged. The City has not undertaken to suspend appellants' license and does not seek to do so. Therefore, we shall not pass on the constitutionality of Section 46A-6, which under the terms of Section 46A-11 may be treated as severable from the rest of the Ordinance.

The two appellants have filed separate briefs. Interstate Circuit, Inc., in its first six points on appeal, and United Artists Corporation in all of its ten points, assert that the Ordinance and its application in this case are violative of the First and Fourteenth Amendments to the Constitution of the United States and of Article 1, Sections 8 and 19 of the Constitution of the State of Texas. We do not agree with appellants.

Sec. 46A-2. Establishment of Board:

This section provides for the creation of the Dallas Motion Picture Classification Board.

Sec. 46A-3. Classification Procedure:

(a) Before exhibiting a film the exhibitor shall file a proposed classification of the film together with a resume of the plot and other information. If the Board approves the exhibitor's proposed classification it shall file its approval. If the Board fails either to file an approved classification or to hold a hearing within five days, the exhibitor's proposed classification shall be considered approved.

(b) If the Board is not satisfied with the exhibitor's proposed classification, it may request an exhibition of the film before the Board at the earliest time practicable with due regard to the availability of the film. At the screening before the Board the exhibitor may appear, make such statements and present such evidence as he may desire. The Board shall file its classification within two days after such screening.

(c) Any initial or subsequent exhibitor may file an application for a change in classification. If the prior classification should be changed to "not suitable for young persons" the exhibitor shall have seven days in which to alter his advertising and audience policy.

(d) The Board shall notify all exhibitors of its classification order.

Of course Article 1, Sections 8 and 19 of the Constitution of the State of Texas does not override the Constitution of the United States. Therefore, we shall in the main confine our discussion to the latter Constitution and interpretations thereof, especially with reference to civil suits since this suit does not involve a criminal action, as did the case of Malone v. State of Texas, 339 S.W. 2d 666.

This is not a totally suppressive ordinance, or one that would totally deny the exhibition to anyone of the picture "Viva Maria" or any other classified film. It does not in any way prohibit the exhibition of any classified picture to adults. It does not even prohibit the exhibition of the picture to any child under the age of sixteen years if accompanied by parent, guardian, husband or wife. It does not prohibit exhibitors from exhibiting pictures classified "not suitable for young persons". It does not prohibit distributors from distributing a picture so classified. It is in the nature of a classification ordinance, the purpose of which is to regulate the exhibition of classified pictures to children.

By providing for such regulation the Ordinance does not contravene the freedom of speech provisions of our Constitu-

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(e) The classification shall be binding on any subsequent exhibitor unless a change in classification is made.

Sec. 46A-4. Offenses:

(a) It shall be unlawful for an exhibitor (1) to exhibit a film which has not been classified; (2) and (3) to exhibit any film classified "not suitable for young persons" under sixteen years of age unless advertising and display media state that the picture is so classified; (4) and (5) knowingly to sell or give to a young person a ticket to a film classified "unsuitable for young persons", or knowingly to permit a young person to view such film.

(d) It shall be a valid defense to any prosecution or other proceeding under the Ordinance that the young person was accompanied by his parent, legal guardian, husband or wife.

tions. The Supreme Court of the United States has itself suggested that such regulation is proper. We quote from the opinion in Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material *deemed harmful to children.* But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population. . . *to reading only what is fit for children.*' Butler v. Michigan, 352 U.S. 380, 383 1 L. Ed. 2d 412, 414, 77 S. Ct. 524. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectional material to children, rather than at totally prohibiting its dissemination." (Emphasis supplied.)

See also Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 88 L. Ed. 645, and People v. Walton, 161 P.2d 498.

Sec. 46A-5. License:

Every exhibitor holding a general motion picture license shall be entitled to issuance of a license to exhibit films classified "not suitable for young persons."

Sec. 46A-6. Revocation or Suspension of License:

Upon complaint being filed that any exhibitor has repeatedly violated the provisions of the Ordinance or has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a classified film, the City Council may after notice and hearing suspend for one year the exhibitor's license for the showing of classified pictures.

Sec. 46A-7. Judicial Review:

(a) Within two days after filing of the classification by the Board, any exhibitor may file a notice of nonacceptance. If the Board desires to contest the exhibitor's nonacceptance, it shall:

(1) Make application in court within three days for a temporary and permanent injunction.

(2) Have application for temporary injunction set for hearing within five days. If the exhibitor waives notice pursuant to rules of procedure and requests a hearing on the merits on the day set for the hearing on the temporary injunction, the Board shall be

Freedom of speech, mighty bulwark that it is in the preservation of our liberties, is not an absolute right—a truth that is recognized by court decisions. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766; and Times Film Corp. v. Chicago, 365 U.S. 43, 5 L. Ed. 2d 403, 81 S. Ct. 391. We do not believe that our forefathers in adopting our constitutional provisions or that subsequent interpreters thereof intended to require of children the same discretion, the same mature judgment, or the same responsibility in sex matters that we do of adults. Freedom of speech does not include the right to teach children that sexual promiscuity is to be approved and accepted as a standard of conduct. And to so hold is not merely to embrace a contemporary local community standard as appellants contend. It involves a contemporary national standard.

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required to waive its application for temporary injunction and shall join in such request.

(3) In the event the exhibitor appeals the City shall reply to appellant's brief within five days.

(4) Same in substance as Paragraph (3) if application for writ is made to Supreme Court of Texas by exhibitor.

(5) If trial court denies the Board's application for injunction and Board appeals, Board shall be required to waive all periods of time allowed it by Texas Rules of Civil Procedure, file motion for new trial only if required and then within two days; shall not amend its motion and shall obtain a hearing within five days. Board shall perfect appeal to Court of Civil Appeals including filing of Transcript, Statement of Facts and brief within ten days and shall then file a motion requesting the Court of Civil Appeals to advance the submission of the appeal.

(6) If the Court of Civil Appeals reverses the trial court's injunction order, or if the court refuses to reverse the order, provisions are made similar to those outlined in Paragraph (5) above for the hearing of and decision by the Supreme Court of Texas.

Sec. 46A-10. Exception to State Law:

Nothing in Ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of Texas Penal Code.

Sec. 46A-11. *Severability Clause:*

Should any section of the Ordinance be held invalid such holding shall not render invalid any other section, the various sections, etc. being deemed severable for this purpose.

This Ordinance avoids constitutional infirmity though it provides for a prior submission of a film under some circumstances. Times Film Corp. v. Chicago, 365 U.S. 43, 5 L. Ed. 2d 403, 81 S. Ct. 391. The process under the terms of the Ordinance takes place under procedural safeguards which require that (1) the burden of proving that the film is not protected rests on the City; (2) the exhibitor is assured by the Ordinance and authoritative judicial construction that within a specified brief period of time the City will ether issue a permit or go to court to obtain a regulated showing of the film; (3) any restraint in advance of final adjudication must be for the shortest period of time compatible with sound judicial resolution; and (4) the procedure must assure a prompt final judicial decision. These are the tests laid down by the Supreme Court of the United States in Freedom v. Maryland, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 in a *total censorship case.*

The Texas Rules of Civil Procedure grant powers to courts to make prompt judicial decisions. In the district courts Rule 245(c) provides that actions may be placed on the trial calendar "in such other manner as the courts deem expedient" and Rule 330(b), applicable to Dallas courts, provides that "the court may set any case for trial at any time so as to allow the parties reasonable time for preparation."

In the appellate courts Rule 410, after listing certain types of cases which shall have precedence in Courts of Civil Appeals then states in Section (f): "Such other cases

as the court by order or rule, may direct." Rule 497 provides that "Causes may be tried in such order as the justices of the Supreme Court may deem to the best interest and convenience of the parties or their attorneys."

The case now before us was filed in the trial court February 14, 1966, tried February 18, 1966, submitted to this court March 28, 1966 and decided April 5, 1966. Appellants surely have no real basis to complain that the judicial procedural time table has been inadequate to meet the requirements set out in the Freedman case.

Appellants complain that the Ordinance leaves too much to the judgment and discretion of the Board. Appellants apparently overlook the fact that this case was not tried in the district court under the "substantial evidence rule", which requires a court to approve an administrative agency's decision if there is any substantial evidence to support it. This was a "*de novo*" trial in which the court was free to make and obviously did make its own independent findings regardless of the findings or judgment of the Board.

Appellants say that the Ordinance is invalid because it provides standards for the judgment which are too broad, vague, uncertain and indefinite to permit of enforcement or to give fair notice of the type of films which may be subject to classification. We see no such infirmity in the Ordinance. In Subsection (f) of Section 46A-1 the Ordinance sets definite standards for classification. Absolute precision is not required, What is required and what we think the Ordinance affords is a sufficiently definite warning of the standards

which are to guide the Board and the Courts in classifying films. As was said in Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498 (at page 1510), 77 S. Ct. 1304:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. *This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process.* '. . . The Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U.S. 1, 7, 8, 91 L. Ed. 1877, 1883, 67 S. Ct. 1538. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous. . . .'" (Emphasis ours.)

Appellants further say the Ordinance is invalid because it involves a contemporary community standard of a local community only, the City of Dallas, and not the State of Texas or the United States. Again we cannot agree with appellants. To regulate to a limited extent the portrayal to children under the age of sixteen years of sexual promiscuity as acceptable is not to apply merely a local community standard. It is to apply a contemporary national standard.

Appellants contend that to support the validity of the Ordinance or any action taken under its terms the City must prove that a film classified "not suitable for young persons"

must pass three tests. We quote from the brief of the distributor, appellant United Artists Corporation:

> "1. It must deal with sex in a manner appealing to the prurient interest, judged by the average person, applying contemporary community standards, and considering its dominant theme as a whole. Roth v. United States, 344 U.S. 476, 1 L. Ed. 2d 1498 (1957); and, 2. It must be patently offensive—so offensive on its face as to affront community standards of decency. Manual Enterprises, Inc. v. Day, 370 U.S. 478 L. Ed. 2d 639 (1962); and, 3. It must be utterly without redeeming value; hence the good may not be weighed against the bad. Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793 (1964)."

We bow to the pronouncements of the Supreme Court of the United States. But we do not believe that the holdings above set out are applicable here. In all of the cited cases the court was considering enactments which sought to impose total censorship. Their effect would have been to ban completely the sale, distribution or exhibiting of the matter involved either to adults or children. The Ordinance we have before us for consideration in this case does no such thing. As we have already pointed out it does not call for total censorship in any instance. It simply applies limited regulations of the conditions under which certain classified pictures may be exhibited to children under the age of sixteen years.

If we be in error in the above holding we nevertheless hold that the Ordinance and its application in this case do not violate the constitutional provisions. We have read the evidence reproduced in the statement of facts and viewed

the film "Viva Maria." The latter was exhibited for our benefit in the court room. The evidence amply supports the implied findings of the Board and the district court that the film offends in all of the particulars named under the three headings quoted in the foregoing excerpt from appellant's brief.

If the three tests are to be applied in this case we think test No. 1 should be modified so that in place of the words "judged by the average person" there should be substituted the words "judged by the average *young person*"—meaning a person under the age of sixteen years. However, we would make the same holding if test No. 1 were not so modified.

In the case of John Cleland's "Memoirs of a Woman of Pleasure" vs Attorney General of the Commonwealth of Massachusetts decided March 21, 1966, 34 "The United States Law Week" 4236, the Supreme Court of the United States reversed a judgment of a Massachusetts court banning the above named book. The court said, "A book cannot be proscribed unless it is found to be utterly without redeeming social value." But the court then went on to say:

> "It does not necessarily follow from this reversal that a determination that 'Memoirs' is obscene * * * would be improper under all circumstances. On the premise, which we have no occasion to assess, that 'Memoirs' has the requisite prurient appeal and is patently offensive, *but has only a minimum of social value*, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected." (Emphasis supplied.)

We hold that "Viva Maria" has only a minimum of social value, if any at all, as to children under the age of sixteen years. And since it is permitted to be exhibited subject only to limited regulations, it is not constitutionally protected from the terms of the Ordinance which the City seeks to apply or from the terms of the temporary injunction granted by the trial court.

Appellant United Artists Corporation, distributor, asserts that it has the same constitutional rights as the exhibitor, yet it is not mentioned in the Ordinance and was not notified of the hearings. There is no merit to this contention. United Artists Corporation does not claim that it is an exhibitor of this or any other picture. It is a distributor and there is nothing in the Ordinance to prevent distribution of the film. The Ordinance has to do with the exhibition of the film to children, not its distribution. Besides, United Artists Corporation intervened in the lawsuit and was given full opportunity to be heard. It has not been harmed.

We overrule the first six points on appeal of appellant Interstate Circuit, Inc. and all ten points of appellant United Artists Corporation.

In its seventh point appellant Interstate Circuit says that under Article 527 of the Texas Penal Code the State preempted to regulation of motion pictures, so that a municipality may not enter the field. In its eighth to sixteenth points, inclusive, appellant complains of the action of the court in overruling exceptions to appellee's pleadings. In its seventeenth point appellant objects to the court's failure

to set forth reasons to justify the granting of the temporary injunction. In its eighteenth and nineteenth points appellant alleges that the temporary injunction was not supported by pleadings and the court misapplied the law. We have considered all these additional points and find no merit in them. They are overruled.

Justice Bateman has written a concurring opinion in which he presents his views somewhat in detail. I have read his concurring opinion and agree with his views as stated by him.

The judgment of the trial court is
AFFIRMED.

DIXON, *Chief Justice*

Bateman, Justice (Concurring)

I concur fully with everything written by my Brother Dixon in his opinion and would like to enlarge somewhat on several of the decisions contained therein.

By its seventh point of error on appeal the appellant Interstate Circuit, Inc. says the court erred in refusing to hold that Article 527 of the Texas Penal Code pre-empted the field of regulating motion pictures, thus making invalid such attempted action by the City. The first two sections of Article 527, Penal Code of Texas, as amended in 1961, prohibit the doing of certain things, including the exhibition of obscene motion pictures, but Section 5 provides, in part, as follows:

> "The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry."

The evidence clearly shows that the film in question is what is known as a "commercial motion picture" and that it has moved, and will probably continue to move in interstate commerce. We think we can safely assume that such movements in interstate commerce will be "legal." Therefore, this motion picture, being one of a class specifically ex-

cepted from the effect of Article 527, is subject to regulation by the City.

Moreover, the City of Dallas, being a home rule city deriving its powers from Article 11, Section 5, of the Texas Constitution, has plenary charter powers which include the power to enact the ordinance here in question, its powers being subject only to the limitation that its charter and ordinances shall contain nothing inconsistent with the Texas and Federal Constitutions or the general laws enacted by the State Legislature. City of Fort Worth v. McDonald, Tex. Civ. App., 293 S.W. 2d 256, wr. ref. n.r.e.; Janus Films, Inc. v. City of Fort Worth, Tex. Civ. App., 354 S.W. 2d 597, wr. ref. n.r.e. *per curiam*, 163 Tex. 616, 358 S.W. 2d 589. Home rule cities have full authority to do anything the Legislature could have authorized them to do prior to adoption of the Home-Rule Amendment, the result being that it is not necessary to look to the acts of the Legislature for grants of power to such cities, but only for limitations on their powers. Forwood v. City of Taylor, 147 Tex. 161, 214 S.W. 2d 282, 286; Yellow Cab Transit Co. v. Tuck, Tex. Civ. App., 115 S.W. 2d 455, wr. ref.

Appellants take the position that in the light of certain pronouncements by the Supreme Court the picture "Viva Maria" is entitled to protection under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Texas Constitution unless it can

be properly said that it is obscene; and that in determining whether it is obscene three tests must be applied, to wit:

> "1. It must deal with sex in a manner appealing to the prurient interest, judged by the average person, applying contemporary community standards, and considering its dominant theme as a whole. Roth v. United States, 344 U.S. 476, 1 L. Ed. 2d 1498 (1957); and,
>
> "2. It must be patently offensive—so offensive on its face as to affront community standards of decency. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 8 L. Ed. 2d 639 (1962); and,
>
> "3. It must be utterly without redeeming value; hence, the good may not be weighed against the bad. Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793 (1964)."

It is my firm opinion that the constitutional guaranties of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as "not suitable for young persons" is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States Supreme Court intended, in Near v. Minnesota, 283 U.S. 697, 716, 75 L. Ed. 1357, 1367, or in any other case, to make such a stringent limitation on the powers of a state or city in this field.

The ordinance under examination, in defining the phrase "not suitable for young persons," does not employ the words "obscene" or "obscenity." The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not

consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted. Conveying to young persons the idea that to be able to enjoy the pleasures of sexual gratification without being burdened with any accompanying responsibility or commitment, and with no retributive consequences, or even the slightest remorse, is acceptable behavior according to accepted standards of the American community, would in my opinion have a much more pernicious effect on the morals of the community than mere obscenities. To say that a community is powerless to protect its youth from such damage because of the constitutional safeguards of free speech is to my mind unconscionable and unacceptable.

We are also asked to dissolve the temporary injunction because the order does not contain a recitation of the judge's reasons for issuing the same, as required by Rule 683, T.R.C.P. It is true that this order merely recites that all parties were represented by attorneys and in person, that they announced ready for trial and that the court, after hearing the testimony and argument of counsel, and after having fully considered the same, together with the viewing in person of the motion picture "Viva Maria", is of the opinion and finds that the appellee is entitled to a temporary injunction. The order then proceeds to grant the temporary injunction. It is also true that several Texas cases have held that this

requirement of Rule 683 is mandatory and that the omission of the reasons for granting the injunction is fatal and requires reversal. Miller v. State, Tex. Civ. App., 305 S.W. 2d 663, no wr. hist.; Northcutt v. Waren, Tex. Civ. App., 326 S.W. 2d 10, wr. ref. n.r.e.; City of Houston v. Rose, Tex. Civ. App., 361 S.W. 2d 477, no wr. hist.

In Miller v. State, *supra*, the temporary injunction had been granted without notice to the defendant and without a hearing. There was neither pleading nor evidence that irreparable wrong, damage or injury was imminently threatened. The order did not state the reasons for its issuance. For all these reasons the order was reversed and remanded.

In Northcutt v. Waren, *supra*, there were also additional substantial grounds for reversal.

In City of Houston v. Rose, *supra*, although the failure to state the reasons for the injunction seems to have been the only ground on which the order was reversed, it was pointed out in the opinion that in several cases it had been held that the failure to set forth the reasons for granting a temporary injunction would not require a reversal "where the record affirmatively shows that no harm resulted."

It seems to be well settled by the following authorities that Rule 683 does not require a reversal when the record "affirmatively shows that no harm resulted." 31 Tex. Jur. 2d, INJUNCTIONS, § 157, p. 274; O'Daniel v. Libal, Tex. Civ.

App., 196 S.W. 2d 211, no wr. hist.; Gonzalez v. Rodriguez, Tex. Civ. App., 250 S.W. 2d 253, no wr. hist.; Rothermel v. Goodrich, Tex. Civ. App., 292 S.W. 2d 882, 884; Payton v. Hurst, etc. Clinic, Tex. Civ. App., 318 S.W. 2d 726, wr. ref. n.r.e. See also Transport Co. of Texas v. Robertson Transports, Inc., 152 Tex. 551, 261 S.W. 2d 549, and Garcia v. Sun Oil Co., Tex. Civ. App., 300 S.W. 2d 724, 735, wr. ref. n.r.e.

As pointed out in O'Daniel v. Libal, *supra*, "The purpose of the rule above referred to is to inform a party just what he is enjoined from doing and the reasons why he is so enjoined." It was also pointed out in that opinion that the application for temporary injunction was set down for hearing and that the appellant filed his answer, that both parties introduced several witnesses, some twenty witnesses testifying at the hearing, and that "the main and sole inquiry" was whether or not the act sought to be enjoined had or would result in a nuisance; that the appellant was familiar with the prayer of appellee's petition, had heard the statement of the court when he pronounced the judgment and that there could be "no doubt but what appellant knew what he was enjoined from doing and the reasons why."

With slight exception, the same may be said of the case at bar. Without further lengthening this opinion by reciting the evidence and the statements of the trial judge at the time he announced his decision in the presence of counsel

for all parties, I would simply state that this record does affirmatively show that no harm resulted from the failure of the judge to recite specifically in his order the reasons why he granted the temporary injunction. Certainly, it will not be argued that such omission probably caused the rendition of an improper judgment or probably prevented appellants from making a proper presentation of the case to this court. Rule 434, T.R.C.P.

Appellants and appellee are each asserting substantive rights under Federal law. Appellants say the film in question is protected under the United States Constitution, while appellee asserts that the exercise of its substantive right to regulate the exhibition of the film is within the bounds of that same Constitution. Yet, we are asked to reverse this case on a purely technical, procedural rule. This we are in effect prohibited from doing by the Supreme Court of the United States in Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L. Ed. 2d 889, wherein the court said that "* * * the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Rule 683, T.R.C.P., under discussion here, is purely procedural and does not involve any substantive rights of the parties. It cannot be invoked to deny the parties, appellants and appellee, of their rights under the Constitution of the United States. For this additional reason the point is overruled.

I am fully persuaded that the temporary injunction was properly granted and that it is our duty to affirm.

BATEMAN, *Associate Justice*

APPENDIX B

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which

the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Texas Constitution

Article I

Sec. 8. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the

abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Texas Penal Code

Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions

Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement; circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure,

instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Section 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion picture produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal

Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Section 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out, and enforce the provisions of this Act. As amended Acts 1955, 54th Leg., p. 386, ch. 107, § 1; Acts 1957, 55th Leg., p. 425, ch. 203, § 1; Acts 1961, 57th Leg., p. 1041, ch. 461, § 1.

Dallas City Ordinance No. 11,284

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by adding thereto a new chapter known as Chapter 46A; Providing for the establishment of a Motion Picture Classification Board; Outlining classification procedures; Defining Offenses relating to the exhibition of films classified "Not Suitable for Young Persons"; Providing for the issuance, revocation and suspension of licenses; Providing for judicial review; Defining public nuisances; Providing for injunctive relief; Providing for an exception to State law; Providing for a severability clause; Providing for a Penalty; Providing for the repeal of Ordinance No. 10963 enacted by the City Council on April 5, 1965, and enacting this ordinance in lieu thereof; and Declaring an Emergency.

WHEREAS, the City Council after investigation on the part of the members of said Council and the hearing of evidence and testimony at a public hearing called for that purpose, is of the opinion and finds that certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; and

WHEREAS, the City Council is of the opinion that legislative action should be taken by this Council for the purpose of classifying the movies to which said young persons of school age are admitted without proper supervision; and

WHEREAS, the City Council is of the opinion and finds that a great portion of said movies are available for screening and for showing more than thirty days prior to their initial exhibition and that the benefits to the public will far exceed the burden placed upon the motion picture industry by having said movies screened and classified; and

WHEREAS, the City Council is of the opinion and finds that motion picture films possess a greater capacity for good and for evil among young persons of school age than most other modes of expression and are, therefore, affected with a public interest; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and is hereby amended by adding thereto a new chapter

known as Chapter 46A, consisting of Section 46A-1 through 46A-11 inclusive, which shall read as follows:

"CHAPTER 46A"

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms
§ 46A-2 Establishment of Classification Board
§ 46A-3 Classification Procedure
§ 46A-4 Offenses
§ 46A-5 License
§ 46A-6 Revocation or suspension of license
§ 46A-7 Judicial Review
§ 46A-8 Public Nuisances
§ 46A-9 Injunctions
§ 46A-10 Exception to State Law
§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relation in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their pruient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the

films as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving

a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board who upon application by the exhibitor shall set a time and place

for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification

posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified as 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License*:

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license:*

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file and order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand it it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of

Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said mo-

tion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necesary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error,

the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exemption to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall

be deemed to be a separate violation and punishable as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

APPENDIX C

Chronology Table for Appendix

All Dates Are 1966

No.	Date	Event	Appendix
1.	Jan. 24	Interstate's Application to Classify "Viva Maria" as "suitable for young persons".	
2.	Jan. 25	Classification Board voted to screen picture.	
3.	Feb. 9	Board classified picture "not suitable for young persons".	
4.	Feb. 11	Exhibitor gave notice of non-acceptance.	
5.	Feb. 14	City filed Plaintiff's Original Petition.	C
6.	Feb. 17	Interstate's Answer filed.	C
7.	Feb. 17	Temporary Injunction hearing began.	
8.	Feb. 17	"Viva Maria" opened at Esquire Theatre.	
9.	Feb. 18	Temporary Injunction entered	C
10.	Feb. 21	Motion to Send Original Exhibits	C
11.	Feb. 21	Interstate's Request of Record and Statement of Facts.	
12.	Feb. 25	Transcript filed.	
13.	Mar. 19*	Interstate's brief filed in Court of Civil Appeals.	
14.	Mar. 24*	City's brief filed.	
15.	Mar. 24	Motion to Advance case and to exhibit picture filed.	

*Briefs not included.

Chronology Table for Appendix
All Dates Are 1966

No.	Date	Event	Appendix
16.	Mar. 24	Motion to Advance granted.	C
17.	Mar. 24	Order to Show Film	C
18.	April 5	Judgment of the Court of Civil Appeals	C
19.	April 5	Opinion of the Court of Civil Appeals	A
20.	April 6	Interstate's Motion for Rehearing filed	C
21.	April 7	City's Reply	
22.	April 20	United Artists Motion for Rehearing	
23.	April 22	City's Reply	
24.	April 25	Appellants' Motion for Rehearing Overruled	C
25.	May 19	Interstate's Petition for Writ of Error	C
26.	May 23	Stipulations between Interstate, United Artists, and City agreeing that City could mail reply to Petition for Writ of Error by May 31. This was done to relieve a conflict arising by virtue of a companion case between the same parties set before the United States Court of Appeals on May 23.	
27.	May 23	Interstate's Application for Writ of Error filed in Supreme Court of Texas	C
28.	May 31	City's Reply mailed	

Chronology Table for Appendix

All Dates Are 1966

No.	Date	Event	Appendix
29.	June 6	Joint Motion to Advance filed.	C
30.	July 27	Texas Supreme Court refuses Writ of Error, n.r.e.	C
31.	Aug. 10	Interstate's Motion for Rehearing filed	C
32.	Aug. 18	City's Reply	
33.	Sept. 30	Interstate's Supplemental Motion for Rehearing	C
34.	Oct. 4	City's Reply	
35.	Oct. 19	Texas Supreme Court overruled Motion for Rehearing	C
36.	Jan. 11, 1967	Notice of Appeal to Supreme Court of United States	C

The above Chronology Table has been prepared by appellant Interstate and approved by the City of Dallas, and is tendered herein to assist in clarifying the time sequence involved in the proceeding.

C-4

Plaintiff's Original Petition

To the Honorable Judge of Said Court:

COMES NOW, the CITY OF DALLAS, a municipal corporation, incorporated under the laws of the State of Texas, complaining of INTERSTATE CIRCUIT, INC., a Delaware corporation, Defendant, and for cause of action would respectfully show the Court:

I.

The CITY OF DALLAS, a municipal corporation, organized under and by virtue of the laws of the State of Texas, is located in Dallas County, Texas, and the Defendant, INTERSTATE CIRCUIT, INC. is a Delaware Corporation with a permit to do business in the State of Texas, with RAYMOND WILLIE, Vice-President and General Manager, Majestic Building, Dallas, Texas, being the agent of said corporation upon whom service of process may be had.

II.

On November 22, 1965, the City Council of the City of Dallas enacted Ordinance No. 11284, known as the City of Dallas Motion Picture Classification Ordinance; Providing for the establishment of a Motion Picture Classification Board, outlining classification procedures, defining offenses related to the exhibition of films "not suitable for young persons"; Providing for the issuance, revocation and suspension of licenses; Providing for judicial review and providing for injunctive relief and defining the term "not suitable for

young persons", a copy of said ordinance being attached hereto and being made a part hereof as Exhibit "A" as though fully written herein word for word.

III.

Plaintiff would further show the Court in this connection that pursuant to said ordinance, the City Council of the City of Dallas appointed a chairman and eight (8) members of the Motion Picture Classification Board, and pursuant to Ordinance No. 11284, and that Ordinance No. 11298 was enacted by the City Council of the City of Dallas on December 6, 1965, which amended Ordinance No. 11284, and pursuant thereto the City Council appointed three (3) alternate members of said Board. A copy of said Ordinance being attached hereto as Exhibit "B" as though fully written herein word for word.

Plaintiff would further show the Court that the above film was classified based upon the standard contained in Subsection (f) of Section 46A-1 of said Ordinance, which read as follows:

> "(f) 'Not suitable for young persons' means:
>
> "(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest."

IV.

Plaintiff would further show the Court that pursuant to Ordinance No. 11284 which requires such action on behalf

of such Motion Picture exhibitor, the Defendant, INTERSTATE CIRCUIT, INC. submitted the film "Viva Maria" to the Motion Picture Classification Board by letter dated January 24, 1966, and Defendant notified said Classification Board that it proposed to classify the film "Viva Maria" to be exhibited at the Esquire Theatre, Dallas, Texas, as "suitable for young persons", and that the Classification Board met on January 25, 1966, and requested a screening of said movie as provided in Ordinance No. 11284, and that said picture was made available to the Motion Picture Classification Board on Monday, February 7, 1966, and that after viewing said film, the Board classified it as being "not suitable for young persons" based upon the standard contained in Subparagraph 2 of Paragraph 4 of Section 46A-1 of Ordinance No. 11284 by protraying sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to the prurient interests.

That the Board filed such classification with the City Secretary of the City of Dallas as provided in said Ordinance, and the City Secretary, as Secretary of the Motion Picture Classification Board, notified the Defendant INTERSTATE CIRCUIT, INC. by letter dated February 9, 1966, and that by letter dated February 11, 1966, Defendant notified the Classification Board of the non-acceptance of such classification, and that it intended to exhibit the film "Viva Maria" at the Esquire Theatre under the classification of "suitable for young persons".

V.

The Plaintiff would further show the Court that on Sunday, February 13, 1966, the Defendant inserted an advertisement in the Dallas Morning News, Dallas, Texas, stating that the film involved herein would be shown at the above named theatre without carrying the notation as required by Ordinance No. 11284, "not suitable for young persons", and that on said date, to-wit: February 17, 1966, the film involved is scheduled to be exhibited at the Esquire Theatre, Dallas, Texas, without carrying the notation "Not suitable for young persons" as provided by Ordinance No. 11284 as was classified by the Dallas Motion Picture Classification Board.

VI.

Plaintiff would further show the Court that the film "Viva Maria" will be exhibited by Defendant INTERSTATE CIRCUIT, INC. at the Esquire Theatre in Dallas, Texas, in violation of Ordinance No. 11284 of the City of Dallas as amended unless Defendant is enjoined, and said Defendant will exhibit said film to the general public, including young persons under the age of sixteen (16) years, in violation of Ordinance No. 11284, without advertising said film as being "not suitable for young persons", and that this matter should be set for hearing before the Court on Plaintiff's application for a temporary and permanent injunction, as provided in Ordinance No. 11284.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer herein,

and that this cause be set for a hearing within five (5) days on its application for a temporary injunction, and that if Defendant will agree, that this cause be heard on its application for a permanent injunction, and that upon a final hearing, said Defendant be adjoined from violating Ordinance No. 11284 as set out above; and that all costs be adjudged against Defendant herein, and for such other and further relief to which Plaintiff may be entitled.

FIAT

On this the 14th day of February, 1966, came on for consideration the sworn Petition of Plaintiff, CITY OF DALLAS, wherein the CITY OF DALLAS is seeking a temporary and permanent injunction against INTERSTATE CIRCUIT, INC., and Plaintiff requests that the cause be set for hearing,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff's application for a temporary and permanent injunction be set for a hearing on the 17 day of February 1966, at 9 o'clock, a.m., and it appearing to the Court that the firm of Tobolowsky, Hartt, Schlinger & Blalock, Attorneys for Defendant, have agreed to waive service of process and to accept service of process; there shall be no service of process by the District Clerk.

Defendant's Original Answer

To the Honorable Judge of Said Court:

Now comes INTERSTATE CIRCUIT, INC., Defendant herein, and files this its original answer to the Plaintiff's

Petition, and for such answer would respectfully show unto the Court the Following: * * *

II.

The Defendant excepts to Plaintiff's Petition in its entirety for the following reasons: * * *

3. The Petition does not allege that in truth and in fact, the motion picture "Viva Maria", portrays sexual promiscuity in such a manner as to incite or encourage delinquency or sexual promiscuity on the part of young persons, or to appeal to their prurient interests. This exception goes to the Petition as a whole, and particularly to the last unnumbered paragraph of Paragraph III, and to the first paragraph of Paragraph IV of Plaintiff's Petition. * * *

VI.

Answering herein affirmatively, the Defendant would show that Ordinance No. 11284 is unconstitutional and violates the rights of this Defendant under the First and Fourteenth Amendments of the Constitution of the United States, and also under the provisions of Article 1, Section 8, of the Constitution of the State of Texas, for the following reasons:

(1) The Ordinance as a whole establishes a form of prior restraint and censorship of communication. The procedures established by it require that the Board classify pictures as "not suitable for young persons" and sets forth a definition of this term in Section 46A-1(f) of Ordinance No. 11284. (In order to avoid encumbering the record with duplication of pleadings, all references to the Ordinance, unless other-

wise stated, will be to Ordinance No. 11284, a copy of which is found in the Plaintiff's Petition, and a copy will be introduced by this Defendant at the time of trial if the same is not done by the Plaintiff as a part of its case.)

(2) The provisions of the Ordinance purporting to define "not suitable for young persons" are vague and indefinite. This definition found in Section 46A-1(f) does not provide any objective standard for the use by members of the Board, but to the contrary, directs the Board to classify a picture as "not suitable for young persons" if, in the judgment of the Board, the picture is likely to incite crime, delinquency, or sexual promiscuity by young persons or to appeal to their prurient interests. Without legally recognized standards which can be determined and applied objectively, the classification of films under the Ordinance will violate plaintiff's rights under the First Amendment.

(3) Prompt judicial determination of any action by the Plaintiff in classifying a motion picture as "not suitable for young persons", must be assured to the Defendant. This provision for prompt judicial determination must be guaranteed by statute or by a final court decision. Neither statutes of the State of Texas, the Texas Rules of Civil Procedure, and the Rules of Practice in Civil Cases in the District Courts of Dallas County provide for prompt judicial determination. The proceedings for a temporary injunction are given certain preferences by statutes, and by Texas Rules of Civil Procedure, but do not give a determination of the Plaintiff's rights since the purpose of the temporary injunction is to preserve the status quo, and such a writ will issue for that

purpose on the showing of a "probable right" and a "probable injury" without sufficient proof to establish a preponderance of the evidence. The trial for a permanent injunction is given no preferential treatment by either rules or statutes. Neither a temporary injunction nor a permanent injunction proceeding provides a prompt judicial determination of the Plaintiff's right to restrict the exhibition of commercial motion pictures licensed for showing in the Defendant's theatres.

Section 7, entitled "Judicial Review", is a concession by the Plaintiff to waive many rights which it would have for the preparation of a case according to standards established by the Texas statutes and Rules of Civil Procedure. The agreement of Plaintiff to waive its rights as found in this section does not provide assurance of prompt judicial review by statute or by court decision. The Plaintiff does not have the power or authority to change either the Texas statutes or the Texas Rules of Civil Procedure, and the attempt by it to establish a system of censorship or classification without providing for prompt review violates the Defendant's rights under the First Amendment. Besides the absence of a statute or court decision assuring prompt judicial review the Plaintiff's action in classifying a picture, the Ordinance is defective because the Plaintiff does not have the right to tell any one of the trial or appellate courts which may hear a case of this nature how to set its docket and to control the actual trial procedures. The Plaintiff's professed cooperation and willingness to assure a speedy trial insofar as its rights are concerned does not provide the essential guarantee that there will be a speedy trial. * * *

(7) Obscenity is the only valid ground for restricting or prohibiting the classification of a commercial motion picture under the amendments to the United States Constitution. Ordinance No. 11284 is an attempt to classify commercial motion pictures based upon their possible effect upon young persons as a special group or class. This is contrary to the constitutional provisions mentioned above and the laws of Texas. This pronouncement regarding the constitutional provisions was made prior to the amendment of Article 527 which exempted commercial motion pictures from obscenity prosecutions as mentioned in the following paragraph. The constitutional provisions alone have been construed to prohibit a classification system such as the Plaintiff seeks to enforce by Ordinance No. 11284.

VII.

The provisions of Ordinance No. 11284 violate the Texas Constitution and the state law in the following particulars:

(1) Article 527 of the Penal Code prohibits distribution of obscene material to minors. The exact language is as follows:

> "Sec. 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, *to a minor*, shall be fined not more than Two Thousand Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both". (Emphasis added.)

This statute preempts the field of distribution of obscene material to minors. The Plaintiff, as a home rule city, cannot legislate in violation and contradiction of the state statute which controls this subject. Only obscene material is denied the protection of the First Amendment of the Constitution of the United States according to repeated decisions of the Supreme Court of the United States; Article I, Section 8, of the Texas Constitution, gives a similar protection and has been so construed by Texas courts; Article 527 of the Penal Code was amended in 1961 to incorporate the Supreme Court's definition of obscenity and to provide the regulation set forth in that statute. * * *

CROSS-ACTION

XII.

The Defendant, Interstate Circuit, Inc., coming now as a Cross-Plaintiff, would show that parties are correctly identified in that Cross-Defendant is a municipal corporation with a home rule charter, and that it, Cross-Plaintiff, is a Delaware corporation doing business in Texas, operating commercial motion picture theatres in that City and elsewhere.

Cross-Plaintiff further adopts the allegations contained in Paragraphs No. VI through XI inclusive as a part of its cross-action. * * *

XIV.

The failure to get a prompt judicial determination of the validity of its classification ordinance as applied to this pic-

ture makes the ordinance unconstitutional to the specific fact application here as well as in the general situations outlined above.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that: ***

(2) That the injunction, both temporary and permanent, be denied the Plaintiff, and that the Plaintiff take nothing by its suit;

(3) That Ordinance No. 11284 of the City of Dallas be declared uunconstitutional in general, and in its particular application herein;

(4) Defendant, as Cross-Plaintiff, prays that Ordinance No. 11284 be declared unconstitutional and that the City of Dallas be permanently enjoined from enforcing the same and attempting to classify and censor commercial motion pictures exhibited by this Cross-Plaintiff;

Statement of Facts

Temporary Injunction

JOHN GILLILAND,

after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. BICKLEY

* * * * *

Q. What connection do you have with the Motion Picture Classification Board of the City of Dallas?

A. I am a member of the board, appointed by the City Council.

Q. And are you vice-chairman of that board?

A. Yes, sir. * * *

CROSS EXAMINATION BY MR. HARTT

* * * * *

Q. As a matter of fact, back to your own opinion from viewing that picture, you do not consider it to encourage or incite crime or delinquency on the part of young persons, do you?

A. Well, I think the ordinance talks about the judgment of the board, if the movie tends to do these things. The board has to rule on this basis. Now, if you are asking me personally,—

Q. Yes, sir.

A. —I think, as far as the violence portion goes, when the clergy got tangled up in it really was the only thing, as far as violence goes. That was not very good as far as I was concerned because it really in a sense okayed violence because the clergy really was the perpetrators of the violence. In that sense I think it falls under that portion. At least that was my opinion.

Q. Wouldn't it be fair to say that that portion was considered by you to be sacrilegious?

A. I don't think of it in that sense myself, but I am sure that entered into it.

Q. You are sure that entered into it. Thank you. This picture had a lot of what could be called spoofing or poking fun, didn't it? * * *

ture makes the ordinance unconstitutional to the specific fact application here as well as in the general situations outlined above.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that: ***

(2) That the injunction, both temporary and permanent, be denied the Plaintiff, and that the Plaintiff take nothing by its suit;

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after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

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A. Yes, sir. * * *

CROSS EXAMINATION BY MR. HARTT

* * * * *

Q. As a matter of fact, back to your own opinion from viewing that picture, you do not consider it to encourage or incite crime or delinquency on the part of young persons, do you?

A. Well, I think the ordinance talks about the judgment of the board, if the movie tends to do these things. The board has to rule on this basis. Now, if you are asking me personally,—

Q. Yes, sir.

A. —I think, as far as the violence portion goes, when the clergy got tangled up in it really was the only thing, as far as violence goes. That was not very good as far as I was concerned because it really in a sense okayed violence because the clergy really was the perpetrators of the violence. In that sense I think it falls under that portion. At least that was my opinion.

Q. Wouldn't it be fair to say that that portion was considered by you to be sacrilegious?

A. I don't think of it in that sense myself, but I am sure that entered into it.

Q. You are sure that entered into it. Thank you. This picture had a lot of what could be called spoofing or poking fun, didn't it? * * *

JAMES ROBERT MACEO,

after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. MACMASTER

Q. Will you please state your name to the Court?

A. James Robert Maceo.

Q. Are you a member of the clergy?

A. Yes, I am.

Q. What religion?

A. The Episcopal Church.

Q. Are you a pastor of the Episcopal Church in Dallas?

A. I am rector of Saint Paul's Episcopal Church.

Q. Where is that located?

A. 1302 West Keist Boulevard. * * *

Q. Are you a member of the City of Dallas Motion Picture Classification Board?

A. Yes, I am.

Q. And you were appointed by the City Council of the City of Dallas?

A. Correct. * * *

CROSS EXAMINATION BY MR. HARTT

* * * * * *

Q. And what do you mean "our community"?

A. The City of Dallas.

Q. And when you and the other board members were discussing "Viva Maria" and speaking in terms of the contemporary standards of the community, you and the board members were speaking of the Dallas community, were you not?

A. I was, and as far as our discussion goes, it was in terms of the teen-agers or young people we know.

Q. And if I were to ask you what the community was that you were considering in the context of the ordinance, you would say you were considering the Dallas community?

A. That is my experience.

Q. And that is the only community you were considering?

A. Yes.

Q. Now, the clergy in this particular picture came out, as the expression goes, they were the ones in the black hats, is that not right?

A. Yes.

Q. They were the baddies?

A. Yes.

Q. Now, someone viewing that picture, do you think it would create the impression on a ten or twelve year old boy or girl that the clergy was bad and evil?

A. Perhaps. I felt it was a mockery. They were bad but they were something to be laughed at.

Q. The clergy were something to be laughed at?

A. There was this mixture in there in which it was hard to determine.

Q. And that was equally true of the bombings, it was a mockery?

A. I didn't get that feeling because there was no sympathy created. I felt no sympathy before going to the movie for oppressors of the poor; I feel no empathy for this characterization. On the other hand, the presumed empathy for the clergy was there, and so I think of the two things, mockery doesn't come to my mind as a word with reference to the other situation.

Q. Now, as I understand, there was some discussion or some feeling amongst the board in their deliberations of "Viva Maria" that it was sacrilegious. Do you recall any such discussion?

A. I recall hearing that word, yes.

Q. And the sacrilegious aspect of it entered into it as far as the board's discussions were concerned?

A. I don't remember.

Q. Do you consider in your opinion the picture to have been sacrilegious?

A. I think my witness would have to be in terms of what I have already made because it is so broad an understanding of what sacrilege is as such. The word mockery is the one I used and one which I feel represents my impression of it. Sacrilegious, I am hard pressed to say. * * *

THE COURT: Oh, I realize you gentlemen might be right. There are two or three features in this picture that look to me would be unsuitable to young people. Actually, they have

tried to track that Friedman [sic] case, looks like, in this ordinance, and if any ordinance can be passed, why, it looks like they have taken every ground to pass one, if one can be valid, that is, valid. So I enjoin the exhibitor, its agents, servants, attorneys and employees from exhibiting it. I guess it is like a book by Mark Twain where he had a vaudeville show and was making no money, the owners of it. Then he had a man to get nude and painted him in striped paint, charged a dollar, which was unheard of in those days, limited it to men only and said, "If this doesn't get the money, I don't know Arkansas," and they did quite well. I sustain the City's position, find it okay, and enjoin them. * * *

Temporary Injunction

On this the 17th day of February A. D. 1966, came on to be heard the above entitled and numbered cause wherein the City of Dallas, as Plaintiff, seeks a temporary injunction against the Interstate Circuit, Inc., as Defendant, and United Artists Corporation, as Intervenor, have subjected itself to the jurisdiction of this Court, all parties having been represented by attorneys and in person, and having announced ready for trial, the Court proceeded to examine the pleadings, hear testimony and the argument of counsel, and after having fully considered the same, together with the viewing in person of the motion picture "Viva Maria", is of the opinion and hereby finds that the City of Dallas, as Plaintiff, is entitled to a temporary injunction.

It is therefore the ORDER, JUDGMENT and DECREE of this Court, and the Court hereby grants a temporary in-

junction against Interstate Circuit, Inc., as Defendant, and United Artists Corporation, as Intervenor, enjoining them from exhibiting said motion picture "Viva Maria" in violation of Ordinance No. 11284, or without advertising said film by media originating within or stationary within the City of Dallas as "not suitable for young persons", and that this temporary injunction shall be effective pending a final hearing for a permanent injunction herein.

The Exceptions of the Defendant and Intervenor in the pleadings are hereby specifically overruled.

The Defendant in open court, requested the Court to file its Findings of Fact and Conclusions of Law and this request is specifically denied.

The Defendant and Intervenor in open court gave notice of appeal *to the Fifth Supreme Judicial District of Texas Sitting at Dallas, Texas.*

Entered this the 18th day of February A. D. 1966.

/s/ A. R. Stout

JUDGE PRESIDING

Motion to Send Original Exhibits as Part of Record to Court of Civil Appeals

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Defendant, Interstate Circuit, Inc., and moves the Court to order the original exhibits received herein as a part of the record to be sent to the Court of Civil Appeals for the use by that Court. As grounds for this motion De-

fendant would show that it would be prohibitively expensive to have copies of the exhibits made, would unnecessarily delay the prosecution of the appeal, and would work a hardship on all parties.

WHEREFORE, premises considered, Defendant prays that the original exhibits herein each be sent to the Court of Civil Appeals or in lieu thereof by agreement of the parties, the Clerk shall be furnished a true copy of such exhibits as, for their own purposes, the parties may wish to keep.

WHEREFORE, premises considered, Defendant prays that this Motion be granted.

Order Advancing Case

Thursday, March 24, 1966

This day came to be heard the motion of appellants to advance submission of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be granted and oral argument is set for Monday, March 28, 1966.

Order to Show Film

Thursday, March 24, 1966

This day came on to be heard the motion of appellants for permission to exhibit the motion picture, "Viva Maria", involved in this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be granted, and that the motion picture in question be shown at 9:00 o'clock a.m., Monday, March 28, 1966.

Opinion of Court of Civil Appeals
Printed as Appendix A

Motion for Rehearing

TO SAID HONORABLE COURT:

Now comes INTERSTATE CIRCUIT, INC., one of the Appellants in the above entitled and numbered cause, and respectfully moves the Court to set aside the judgment of this Court, rendered on April 5, 1966, affirming the judgment of the trial court, and to grant this Appellant a rehearing, and to reverse the judgment of the trial court, as prayed for in the brief on file herein, and as grounds for this motion would respectfully show the following:

I.

The Court of Civil Appeals erred in overruling Appellant's first point, reading as follows:

> The error of the Court in refusing to hold that Ordinance No. 11284 is unconstitutional because it restricts free communication in violation of the First and Fourteenth Amendments of the Constitution of the United States.

II.

The Court of Civil Appeals erred in overruling Appellant's second point, reading as follows:

> The error of the Court in refusing to hold that Ordinance No. 11284 is unconstitutional because it restricts free communication in violation of Article 1, Section 8, of the Constitution of the State of Texas.

III.

The Court of Civil Appeals erred in overruling Appellant's third point, reading as follows:

> The error of the Court in refusing to hold that Ordinance 11284 is unconstitutional because the standards of classification in Section 46A-1(f) are vague and without legal meaning for censorship.

IV.

The Court of Civil Appeals erred in overruling Appellant's fourth point, reading as follows:

> The Court erred in sustaining the classification of "Viva Maria" as "not suitable for young persons". Appellee's testimony showed that this classification was made upon the basis that it was "sacreligious".

V.

The Court of Civil Appeals erred in overruling Appellant's fifth point, reading as follows:

> The Court erred in sustaining the classification of "Viva Maria" as "not suitable for young persons". Appellee's testimony showed that the community standard involved a geographic area of the City of Dallas only, and not of the State of Texas or the United States.

VI.

The Court of Civil Appeals erred in overruling Appellant's sixth point, reading as follows:

> The Court erred in finding that "Viva Maria" was "not suitable for young persons" in that the Court's judg-

ment was based upon a few isolated scenes taken from the entire picture and not on its dominant theme as a whole.

VII.

The Court of Civil Appeals erred in overruling Appellant's seventh point, reading as follows:

> The error of the Court in refusing to hold that Article 527 of the Texas Penal Code preempted the field of regulating motion pictures action by any municipality such as the City of Dallas.

VIII.

The Court of Civil Appeals erred in overruling Appellant's eighth point, reading as follows:

> The Court erred in overruling Appellant's exception II (1), in which it pointed out that the petition did not allege that the Appellee had no adequate remedy at law.

* * * * *

XIX.

The Court of Civil Appeals erred in overruling Appellant's nineteenth point, reading as follows:

> The error of the Court in misapplying the law in the foregoing eighteen points is an abuse of discretion in each instance.

Orders Overruling Motion for Rehearing

Monday, April 25, 1966

This day came on to be heard the motion of appellant Interstate Circuit, Incorporated, for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

This day came on to be heard the motion of appellant United Artists Corporation for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

APPLICATION FOR WRIT OF ERROR

* * * * *

FIRST POINT OF ERROR

(Germane to Appellant's first point in its Brief and the first ground in its Motion for Rehearing in the Court of Civil Appeals.)

The error of the Court in refusing to hold that Ordinance No. 11284 is unconstitutional because it restricts free communication in violation of the First and Fourteenth Amendments of the Constitution of the United States.

SECOND POINT OF ERROR

(Germane to Appellant's second point in its Brief and the second ground in its Motion for Rehearing in the Court of Civil Appeals.)

The error of the Court in refusing to hold that Ordinance No. 11284 is unconstitutional because it restricts free communication in violation of Article I, Section 8, of the Constitution of the State of Texas.

THIRD POINT OF ERROR

(Germane to Appellant's third point in its Brief and the third ground in its Motion for Rehearing in the Court of Civil Appeals.)

The error of the Court in refusing to hold that Ordinance No. 11284 is unconstitutional because the standards of classification in Section 46A-1(f) are vague and without legal meaning for censorship.

FOURTH POINT OF ERROR

(Germane to Appellant's fifth point in its Brief and the fourth ground in its Motion for Rehearing in the Court of Civil Appeals.)

The Court erred in sustaining the classification of "Viva Maria" as "not suitable for young persons." Appellee's testimony showed that this classification was made upon the basis that it was "sacrilegious".

FIFTH POINT OF ERROR

(Germane to Appellant's fifth point in its Brief and the fifth ground in its Motion for Rehearing in the Court of Civil Appeals.)

The Court erred in sustaining the classification of "Viva Maria" as "not suitable for young persons." Appellee's testimony showed that the community standard involved a geographic area of the City of Dallas only, and not of the State of Texas or the United States.

SIXTH POINT OF ERROR

(Germane to Appellant's sixth point in its Brief and the sixth ground in its Motion for Rehearing in the Court of Civil Appeals.)

The Court erred in finding that "Viva Maria" was "not suitable for young persons" in that the Court's judgment was based upon a few isolated scenes taken from the entire picture and not on its dominant theme as a whole.

SEVENTH POINT OF ERROR

(Germane to Appellant's seventh point in its Brief and the seventh ground in its Motion for Rehearing in the Court of Civil Appeals.)

The Court erred in refusing to hold that Article 527 of the Texas Penal Code preempted the field of regulating motion pictures from any municipality such as the City of Dallas.

Petitioner's Motion to Advance

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now comes the Petitioner, INTERSTATE CIRCUIT, INC., joined by the Respondent, City of Dallas, and moves the Court to advance this case for consideration on the

pending Application for Writ of Error for the following reasons:

I.

The suit involves an appeal from a temporary injunction.

II.

The City of Dallas is enforcing a classification system on motion pictures. For this system to be legal, all parties recognize that a prompt judicial review is necessary.

III.

By seeking this advancement on the docket, the Petitioner does not concede that the classification system, and the procedures relating thereto, provide prompt judicial review; neither does the City of Dallas concede that prompt judicial review is denied if this motion is not granted.

IV.

This case is one of several arising under the terms of the ordinance. It is important for the parties here, and for the lower courts that will deal with these other cases, both at the trial and appellate levels, to have the issues of this case determined as soon as possible, if review is to be granted.

V.

Respondent, by joining here, does not concede that Writ of Error should be granted, but simply requests that the decision on the Application be determined as soon as possible.

VI.

In the event that the Application for Writ of Error is granted, this Petitioner and the Respondent request that the submission of this case be set at the Court's earliest convenience so that a decision can be reached on this matter.

WHEREFORE, PREMISES CONSIDERED, This Petitioner, Interstate Circuit, Inc., and the Respondent, City of Dallas, pray that the Court consider the Application for Writ of Error at the earliest convenience of this Court; and, further, that if the Writ of Error be granted, that the case be set for submission at the earliest convenience of the Court.

Supreme Court of Texas

July 27, 1966

Application of Interstate Circuit, Inc. and application of United Artists Corporation for writs of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the applications present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicants, Interstate Circuit, Inc., and United Artists Corporation pay all costs incurred on their respective applications.

Motion For Rehearing

To the Honorable Supreme Court of Texas:

"RECORD NOT FULLY REVIEWED

"Please don't deny this application for writ of error without examining the record! The motion picture 'The Virgin Spring', together with the necessary projection equipment, is a part of the record by stipulation. * * *"

So began the Motion for rehearing in *Janus Films, Inc. v. City of Fort Worth*, 163 Tex. 616, 358 S.W. 2d 589, 354 S.W. 2d 597 (1962). This was the first motion picture censorship case to reach the Supreme Court of Texas in forty years, since *Xydias Amusement Company v. City of Houston*, 185 S.W. 415 (Tex. Civ. App. 1916) error ref.

Janus Films, Inc. v. City of Fort Worth, supra, squarely presented a question regarding the interpretation of Article 527 of the Texas Penal Code, together with questions of free speech under the First Amendment of the Constitution of the United States, and Article I, Section 8, of the Texas Constitution. Also involved was the fundamental question of whether or not the motion picture under consideration was obscene.

The Petitioner here would adopt the quoted language and ask the Court in this case not to deny the application for writ of error without examining the record. Such an abject plea can be justified only by the importance of protecting the

right of free speech guaranteed by Article I, Section 8, of the Texas Constitution, and by the First Amendment of the Constitution of the United States.

In the present case, the motion picture is a part of the record. It was viewed by the Court of Civil Appeals, and as was stated on page 17 of the Application for Writ of Error:

> "It is the duty of any court reviewing a motion picture case to examine the picture. *Jacobellis v. State of Ohio*, 378 U.S. 184, 84 S. Ct. 1676. This picture and the related projection equipment will be set up at a place of the Court's convenience, for viewing as a part of the record by agreement."

Are motion pictures entitled to the protection of the First Amendment of the Constitution of the United States as a method of free communication? Is Article I, Section 8, of the Texas Constitution, which guarantees free speech, to be construed by the Texas courts as including the commercial motion picture industry?

In 1952, the Supreme Court of the United States, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502, 72 S. Ct. 777, 781, said:

> "For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion of *Mutual Films Corp. v. Industrial Comm.*, supra, is out of harmony with the views here set forth, we no longer adhere to it."

That opinion, of course, made no comment regarding Article I, Section 8, of the Texas Constitution, but it did overrule *Mutual Films Corp. v. Industrial Comm.*, 236 U.S. 233,

35 S. Ct. 387 (1915) which was the underlying bedrock of *Xydias Amusement Company v. City of Houston*, supra, which was also construed to apply to Article I, Section 8, of the Texas Constitution.

The *Burstyn* case was decided in 1952. Nine years later the Texas Legislature amended Article 527 of the Penal Code. Prior to that time, Article 527-b had stated, in Section 4:

> "The provisions of this Act shall not apply to any daily or weekly newspaper * * *"

The 1961 amendment of Article 527 exempted three classes of commercial motion pictures from the obscenity provisions, and said:

> "The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures * * *"

A similar provision was given to newspapers by the next unnumbered paragraph of 527, Section 5, which stated:

> "The provisions of this Act shall not apply to any daily or weekly newspapers."

The only decision by the Texas court, construing this new language, was by the Court of Civil Appeals in the *Janus* case, supra, 354 S.W. 2d 597.

The history of this statute was recently the subject of a comment by the United States Court of Appeals for the Fifth Circuit in *Chemline, Inc., v. City of Grand Prairie*, et

al., ... F. 2d ..... (5th Cir. 1966) in an opinion rendered July 6, wherein it stated in part:

> "The only Texas case dealing with the effect of Article 527's exclusion is *Janus Films, Inc. v. City of Fort Worth*, Tex. Civ. App. 1962, 354 S.W. 2d, 597. Without explanation or discussion, it holds that the exclusion does not prevent home rule cities from prohibiting the exhibition of obscene pictures. The Texas Supreme Court in refusing a writ of error, n.r.e., 358 S.W. 2d 589, did the unusual thing of writing a brief opinion. The Court said that the trial court had not abused its discretion in denying a temporary injunction of the City ordinance, since the purpose of such injunction is to preserve the status quo and had the court granted it, the movie would have been shown and the status quo would not have been preserved."

The Court further stated:

> "This opinion is not to be construed as passing on the merits of the case in any respect."

The opinion went on to state that the abstention doctrine was not invoked because of the decision in *United States Service Life Insurance Company v. Delaney*, 386 S.W. 2d 648 (Tex. Civ. App. 1965), aff'd, ... Tex, ..., 396 S.W. 2d 855 (1965).

The present case, unlike *United States Service Life Insurance Company v. Delaney*, supra, does not seek an advisory opinion. Article 527 has been in dispute before in cases before this Court, is here now, and has been in dispute in other suits such as the *Chemline* case, supra. For this language to be construed to mean that every city and town can have a censor board, or, as the Respondents

here prefer to call it, the "Classification Board," appears to do violence to common sense, the meaning of the statute itself, and to be contrary to both of the constitutional provisions mentioned above.

Besides the ultimate question of determining whether "Viva Maria" is, along with the other descriptions used in the opinion of the Court of Civil Appeals, "patently offensive," the Supreme Court of Texas may wish to give guidance to the trial courts, the Courts of Civil Appeals, and to federal courts which deal with the question, in a proper interpretation of Article 527.

It is possible that Article I, Section 8, of the Texas Constitution, was not broad enough to include commercial motion pictures when they were classed as an item of free speech and free press in *Joseph Burstyn, Inc. v. Wilson*, supra. This does not seem logical to the Petitioner. It is possible that a very restrictive interpretation of the right of free communication under the First Amendment of the Constitution of the United States is to be placed upon the commercial motion picture industry in Texas. The Petitioner does not believe this, either. Yet, in fact, this is being done from time to time. Fort Worth did so in the *Janus* case, as did the Respondent here. The *Janus* decisions and the decision of the Court of Appeals in the present case certainly will encourage every municipality to form a censor or classification board, or both.

The 1961 amendment of Article 527 had for one of its purposes the exempting of certain classes of motion pictures from any regulation under this provision of the code. The

sole purpose of Article 527 is to restrict the display, distribution, and publication of obscene matters. The amendment of 1961, in specifically exempting from regulation certain classes of motion pictures, manifested a legislative intent that these classes of motion pictures should not be subject to regulation or restriction at the state and, by inference, local levels. The following language is found in many cases:

> "Intention of the Legislature is the dominant consideration in construing a statute." Calvert v. British-American Oil Producing Co., ... Tex. ....., 397 S.W. 2d 839, 842 (1965).

The Supreme Court is required to give the exemption written in Article 527 referring to certain classes of motion pictures the meaning the legislature intended the exemption to have, insofar as that is in the ability of the court. *Standard v. Sadler*, ... Tex. ....., 383 S.W. 2d 391 (1964).

The rights of free speech and free press have been described many times as fundamental freedoms. This has been done both by the Supreme Court of the United States and various appellate courts in all of the states, including Texas. Therefore, it can be presumed to be true.

The concept "writ refused, no reversible error", implies that there are errors of some note in the record. These may be great or small and they could include an improper interpretation of Article 527, of either of the constitutional provisions, or of the fact question itself, which is the duty of the appellate courts to examine in First Amendment cases;

according to the Supreme Court of the United States in *Jacobellis v. State of Ohio*, supra, cited above.

The Petitioner does not believe that the Texas law should be left in the position where twice the loss of the right of free speech is classed as an error, but not a "reversible error". Rule 434 and 483, T.R.C.P. on Harmless Error and No Reversible Error, are ordinarily thought of as applying to a matter of less importance than items found in the Bill of Rights, such as is freedom of speech, freedom of press and freedom of religion.

Unless this motion for rehearing is granted, there will be another case on the books in which denial of free speech in Texas is classed as only a harmless error.

There is no prompt judicial review.

Freedman v. State of Maryland, 380 U.S. 51, 85 S. Ct. 734 (1965) required that any system of prior restraint or censorship assure the exhibitor of a prompt judicial review. By using the temporary injunction procedure, as found in the Texas courts' system, and by an involved and intricate ordinance, the Respondent sought to gain priority in the hearing of cases in Texas courts. The history of this case shows that the courts have not allowed the respondents scheme to succeed. In *Interstate Circuit, Inc., et al., v. City of Dallas*, 249 F. Supp. 19, (N.D. Tex. 1965) decided December 23, the United States District Court for the Northern District of Texas held that Ordinance 11926 provided a system by which an exhibitor, such as the Petitioner here, could be assured of a prompt judicial determination. The

actual language of the opinion stated that the Ordinance afforded a system by which a case could be filed in the district court, appealed, and acted upon by the Supreme Court of Texas in thirty-five (35) days!

This case was filed February 14, 1966. On July 27, this Court denied a writ of error without deciding the case. This is only 163 days later. The case was filed as an appeal from the suit granting a temporary injunction and was therefore entitled to a statutory preference. A cursory examination of the numbers of the cases decided by this Court in recent weeks and the dates on which they were filed does not indicate that this suit, involving a temporary injunction and further involving the Constitutional right of free speech, was given any preferential treatment of measurable significance.

The joint motion to advance this case for early submission, setting forth the reasons therefor, was filed by the Petitioner and Respondent on the 7th day of June.

It is appropriate to note that after this motion was filed, there was a period of 50 days before the Court decided not to hear the case.

If the case had been set for submission, we presume that it would have been reached in due order, along with other cases at the beginning of the October term.

The foregoing comments are not made for the purpose of criticizing this Court, in any manner whatsoever. It is necessary to itemize these points for the purpose of showing that the entire concept underlying the Respondent's Ordi-

nance 11284 is simply not a fact. You cannot start a lawsuit in the State of Texas, go through the Court of Civil Appeals, and get a decision from the Supreme Court in thirty-five (35) days. You cannot get this decision in thirty-five (35) days even though the attorneys for the respective parties are personal friends and extend to each other every professional courtesy in a form of cooperation that is not inconsistent with protecting the rights of the respective clients.

Prompt judicial review is required of such ordinances by the opinion in *Freedman v. State of Maryland, supra.* In the present case, 163 days lapsed from its filing until the Texas Supreme Court refused a writ of error, without discussion of its merits. This period of time, plus whatever additional time might elapse until a decision is rendered on the merits, is not a prompt judicial review.

The Supreme Court of the United States recognized in *Bantam Books v. Sullivan,* 372 U.S. 58, 83 S. Ct. 631 (1963), that ordinarily the local retailer does not have the money to carry on litigation to protect the right to sell a particular book. A similar concept is true in the motion picture industry. In the present suit, the distributor has intervened. However, there are other cases presently pending where this did not happen. All of the parties here are somewhat in the same position as described by Justice Douglas in *England v. Louisiana State Bd. of* Med. Exam., 375 U.S. 411, 84 S. Ct. 461 (1964), where he said that litigants do not have long pockets.

The classifiication board here or the censor board in another case makes its point by simply refusing the permit and thus, free speech is denied unless a reasonably prompt,

comparatively economical determination can somehow be made by a court in Texas as to what Article 527 means. What is the law on this subject? How is it to be interpreted, properly, both by the attorneys in advising the clients and by the lower courts? As was so succinctly stated in the *Freedman* case, supra:

> " * * * Otherwise, litigation may be unduly expensive and protractive, or the victorious exhibitor may find the most propitious opportunity for exhibition past."

WHEREFORE, PREMISES CONSIDERED, Petitioner again reargues each of the points in its application for writ of error, and respectfully prays that this application be granted.

Supplemental Motion for Rehearing

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now comes Interstate Circuit, Inc., one of the Petitioners herein, and files this, its Supplemental Motion for Rehearing, and as grounds therefor would respectfully show the following:

I.

The necessity for a prompt judicial review is an essential element for any system of censorship or prior restraint. *Freedman v. State of Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965).

The present case began on February 14, 1966, when the City of Dallas filed its suit for an injunction. The case was

filed in this Court on May 23, 1966, and the decision of the Court refusing the petition with the endorsement, "Writ Ref., n.r.e.", was dated July 27, 1966.

It has been approximately seven and one-half (7½) months from that date until this Court reconvenes for the October term.

The opinion of Judge Hughes in *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19 (N.D. Tex. 1965), was based on the assumption that the Texas courts provided a prompt final judicial review. In its argument in the Federal Court, the Respondent claimed that the courts of Texas gave preferential treatment to its cases. The Court of Civil Appeals did everything within its power to expedite the case in order that the classification ordinance could be sustained. The City of Dallas was not so fortunate in this Court. Here, even with a joint motion to advance the case, the suit received no preference whatsoever.

This is clearly demonstrated by a chart of ten cases before and after *Interstate Circuit, Inc., et al. v. City of Dallas*, Cause No. A-11, 490. This chart and the certificate of the Clerk of the Supreme Court of Texas shows twenty-one (21) cases beginning with A-11, 480, *Phillips et al v. Parrish, et al.*, and continuing through *City of Houston v. Fore*.

Several of the cases filed on May 23, 1966, or later, received action by this Court before July 27, 1966. Following

the chronological tables beginning with No. 1, those cases which were acted on before July 27 are Numbers 2, 3, 4, 5, 7, 9, 13, 14, and 15. The exact date of the action on the petition for writ of error is shown in Column 7 of the chart, with the number of days which passed between the filing of the petition and the action of the Court shown in Column 8.

The chart here shows no ascertainable preference accorded to the City of Dallas or its lawsuit. Neither was there any preference given to this particular kind of litigation.

It is important to state unequivocally that cases involving the City of Dallas, arising under its motion picture ordinance, do not receive preferential treatment. Unless preferential treatment is given, as Judge Hughes ruled in the first ordinance case, *Interstate Circuits, Inc. v. City of Dallas*, 247 F. Supp. 906 (N.D. Tex. 1965), Texas courts do not provide a prompt judicial review.

Therefore, the first ordinance was void. Without a prompt judicial review, this ordinance also should be held void.

Judge Hughes' opinion in the second ordinance case reached the United States Court of Appeals. In *Interstate Circuit, Inc. v. City of Dallas*, ... F. 2d ....., decided August 30, 1966, the Court sustained a test of "obscene for young people", but refused to sustain a test relating to any other subject, such as "harmful effects", "encouraging crime", "juvenile delinquency", etc.

There is a motion for rehearing presently pending in that case before the United States Court of Appeals, but, in any event, the Supreme Court of Texas is now asked to review

this record and to note that the ordinance as applied here does not determine that "Viva Maria" is "obscene when viewed by an audience of young persons."

A copy of the Chart, "Chart of Ten Cases Before and After *Interstate Circuit, Inc., et al. v. City of Dallas*, Cause No. A-11, 490, and Certificate of the Clerk of the Supreme Court of Texas", is included in the appendix of this Supplemental Motion. In addition, three duplicate original copies of this Chart, bearing the Certificate of the Clerk of the Supreme Court are included, but not attached.

WHEREFORE, PREMISES CONSIDERED, Petitioner again re-urges each of the points in its Application for Writ of Error, and respectfully prays that this Application be granted and that the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, be reversed and rendered in favor of the Petitioner, or, in the alternative, that the Judgment of the Court of Civil Appeals and the District Court be reversed, and this cause be remanded for a trial on the merits in accordance with the instructions resulting from an opinion of this Court resolving the constitutional questions presented here.

Chart of Ten Cases Before and After *Interstate Circuit, Inc. et al., v. City of Dallas*, Cause No. A-11490

1. No.	2. S. Ct. No.	3. Style/Southwest Citation	4. Nature of Suit	5. Filed in S. Ct.	6. S. Ct. Action	7. Date	8. Lapsed Time Between Filing	9. Set for Sub-mission	10. Motion for Re-hearing Overruled
1.	A-11480	Phillips et al. v. Parrish et al., 401 S.W. 2d 347	Declaratory Judgment	5-19-66	Ref. N.R.E.	7-27-66	69 Days		
2.	A-11481	Roberts et ux. v. Hodges, 401 S.W. 2d 332	Suit on Okla. Judgment	5-23-66	Ref. N.R.E.	6-29-66	37 Days		
3.	A-11482	Petty v. Texas Employers Insurance Association, 401 S.W. 2d 678	Workmen's Compensation	5-23-66	Ref. N.R.E.	6-22-66	30 Days		7-20-66
4.	A-11483	Head v. City of Shore Acres, et al., 401 S.W. 2d 703	Compel Issuance of Permit	5-23-66	Ref. N.R.E.	6-15-66	23 Days		
5.	A-11484	Walton et al. v. Hardy, 401 S.W. 2d 614	Partition Suit	5-23-66	Ref. N.R.E.	6-15-66	23 Days		7-13-66
6.	A-11485	Flores et al. v. Great American Insurance Co., 401 S.W. 2d 690	Workmen's Compensation	5-23-66	Ref. N.R.E.	7-27-66	65 Days		
7.	A-11486	Universal Underwriters Ins. Co. v. Bounds, 401 S.W. 2d 865	Workmen's Compensation	5-23-66	Ref. N.R.E.	6-29-66	37 Days		
8.	A-11487	Moulton et al. v. Alamo Ambulance Service, 402 S.W. 2d 200	Personal Injury	5-23-66	Granted	7-27-66	65 Days	10-19-66	
9.	A-11488	Sanders v. Dunlap, 401 S.W. 2d 367	Trespass to Try Title	5-23-66	Ref. N.R.E.	6-15-66	23 Days		
10.	A-11489	Forristall et al. v. Federal Insurance Co., et al., 401 S.W. 2d 285	Declaratory Judgment	5-23-66	Ref. N.R.E.	7-27-66	65 Days		
11.	A-11490	Interstate Circuit, Inc., et al., v. City of Dallas, 402 S.W. 2d 770	Temporary Injunction—Free Speech	5-23-66	Ref. N.R.E.	7-27-66	65 Days		Pending

1. No.	2. S. Ct. No.	3. Style/Southwest Citation	4. Nature of Suit	5. Filed in S. Ct.	6. S. Ct. Action	7. Date	8. Lapsed Time Between Filing	9. Set for Submission	10. Motion for Rehearing Overruled
12.	A-11491	Texas & Pacific Railway Co. v. McCleery, 401 S.W. 2d 693	Personal Injury	5-23-66	Granted	7-27-66	65 Days	10-26-66	
13.	A-11492	Pierce v. Ford Motor Company, 401 S.W. 2d 355	Damage—Warranty Suit	5-24-66	Dismissed	6-22-66	29 Days		
14.	A-11493	National Life & Accident Insurance Co. v. Morris, 402 S.W. 2d 297	Insurance Policy	5-24-66	Ref. N.R.E.	6-29-66	36 Days		
15.	A-11494	Bsuse v. Sovereign Life Ins. Co., 401 S.W. 2d 926	Insurance—Personal Injury	5-25-66	Ref. N.R.E.	6-29-66	35 Days		7-20-66
16.	A-11495	State v. Nelson et vir., 401 S.W. 2d 880	Condemnation Proceeding	5-26-66	Ref. N.R.E.	7-27-66	62 Days		
17.	A-11496	Barrie et vir. v. Costello et vir., 401 S.W. 2d 707	Habeas Corpus Child Custody		Ref. N.R.E.	7-27-66	61 Days		
18.	A-11497	Roark v. Texas Municipal Retirement System, 401 S.W. 2d 913	Require Pension Payments	5-27-66	Ref. N.R.E.	7-27-66	61 Days		
19.	A-11498	International Motorist Assn. v. Aguilar, 402 S.W. 2d 516	Recover Attorney Fees	5-30-66	Still Pending				
20.	A-11499	Waco Transit Corp. et al. v. Transport Workers Union of America, Local No. 276 et al., 402 S.W. 2d 253	Arbitration—Collective Bargaining	5-31-66	Ref. N.R.E.	7-27-66	57 Days	10-26-66	
21.	A-11500	City of Houston v. Fore, 401 S.W. 2d 921	Street Paving Assessment	5-31-66	Granted	7-27-66	57 Days		

Order Overruling Motions for Rehearing

October 19, 1966

Motions of petitioners for rehearing of their applications for writs of error having been duly considered, it is ordered that said motions be, and hereby are, overruled.

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that Interstate Circuit, Inc., the Appellant above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals For The Supreme Judicial District of Texas Sitting at Dallas affirming judgment of the trial court entered in this action on April 5, 1966.

This Appeal is taken pursuant to 28 U.S. Code § 1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of pleadings filed in the District Court containing, among other things, the following:
   a. Plaintiff's Original Petition.
   b. Answer in Intervention of United Artists Corporation.
   c. Defendant's Original Answer
   d. Trial Amendment (by the Plaintiff).
   e. Motion to Strike Answer in Intervention.
   f. Plaintiff's First Supplemental Petition.
   g. Temporary Injunction.

h. Motion to Send Original Exhibits as part of Record to Court of Civil Appeals.

i. Order to Send Exhibits in Original Form.

2. Supplemental Transcript.

3. Statement of Facts

4. Opinion and Concurring Opinion of the Court of Civil Appeals.

5. Judgment of the Court of Civil Appeals.

6. Motions for Rehearing.

7. Order Overruling Motion for Rehearing.

8. Petitions for Writ of Error.*

9. Transmittal letter to Honorable George H. Templin, Clerk of the Supreme Court of Texas from Justin G. Burt,

10. Motion to Advance Submission to Supreme Court.*

11. Order of the Supreme Court of Texas refusing Petition for Writ of Error.*

12. Motion for Rehearing in Supreme Court by Interstate Circuit, Inc.* .....

13. Motion for Rehearing by United Artists Corporation, Inc.*

14. Reply to Motions for Rehearing.*

15. Order of the Supreme Court of Texas overruling Motions for Rehearing on Petitions for Writ of Error.*

16. Chart of Ten Cases Before and After *Interstate Circuit, Inc., Et Al. v. City of Dallas*, Cause No. A-11490, certified by George H. Templin, Clerk of the Supreme Court of Texas.

17. This notice of Appeal.

III. The following questions are presented by this Appeal:

1. Whether Ordinance 11284 is unconstitutional because it does not guarantee a prompt final judicial decision to review actions of the Dallas Motion Picture Classification Board in classifying a motion picture as "not suitable for young persons"?

2. Whether Ordinance 11284 is unconstitutional because it prohibits the free exhibition of motion pictures on standards that are vague and ambiguous instead of limiting the restraint on free exhibition to those pictures which are obscene as that term has been defined by this Court?

3. Whether the Dallas Motion Picture Classification Board and the lower courts each applied unconstitutional standards in classifying the motion picture *Viva Maria* as "not suitable for young persons"? As sub-parts of this question, (a) it should be determined whether members of the Dallas Motion Picture Classification Board use the term "sacrilegious" as a basis for determining that the picture was "not suitable for young persons"; (b) whether the members of the Classification Board based their conclusion that the Picture was not suitable upon a few isolated scened [sic] and not on the dominant theme of the picture considered as a whole.

*These items are furnished as a separate certificate from the Clerk of the Supreme Court of Texas.

SUPREME COURT, U. S.

MAR 31 1967

JOHN F. DAVIS, CLERK

No. ~~1109~~ 56

In the

Supreme Court of the United States

OCTOBER TERM, 1967

INTERSTATE CIRCUIT, INC., et al.,

Appellants,

v.

CITY OF DALLAS,

Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas.

MOTION TO DISMISS

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No. 1109

In the

Supreme Court of the United States

OCTOBER TERM, 1966

INTERSTATE CIRCUIT, INC., et al.,

Appellants,

v.

CITY OF DALLAS,

Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas.

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it does not present a substantial federal question, or if the Court deems that there is a substantial federal question, Appellant's first question sought to be reviewed was not timely and properly raised.

JURISDICTION

This Appellant, Interstate Circuit, Inc., has presented three questions in its jurisdictional statement. No jurisdiction exists to review the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, because none of the questions as presented by Appellant represents a substantial federal question. Additionally, the first question raised by Appellant was not timely and properly raised. The Dallas Motion Picture Classification Ordinance, both on its face and as applied to the Appellant, does not violate any rights guaranteed by the United State Constitution.

QUESTIONS PRESENTED

1. Whether the prompt final judicial decision as provided by the Dallas Motion Picture Classification Ordinance is a sufficient safeguard against constitutional infirmities?

2. Whether the Dallas Motion Picture Classification Ordinance provides sufficiently definite standards for the classification of motion pictures, or whether obscenity, which receiyes no protection under the Constitution of the United States and as such can be totally prohibited, is the only basis for classifying motion pictures?

3. Whether or not the facts and the evidence support the Dallas Motion Picture Classification Board, the trial Court, and the Court of Civil Appeals in their determination that the motion picture, "VIVA MARIA," should be properly classified as "not suitable for young persons"?

STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States and the Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11,284, Appellant's Appendix B.

STATEMENT

The Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11,284 (Appellant's Appendix B Page 5), sought to be enforced in this case does not totally deny the exhibition of any motion picture to anyone. It is not a censorship ordinance. It is a classification ordinance. It does regulate the conditions under which young people under the age of sixteen (16) years may see a film, which has been classified as "not suitable for young persons"; that is, if the film has been so classified, the young person must be accompanied by his parent, guardian, husband or wife. The Dallas Classification Ordinance contains absolutely no provision which would prohibit the exhibition of any motion picture.

Appellant, Interstate Circuit, Inc., is an Exhibitor of commercial motion pictures. In compliance with the Dallas Motion Picture Classifiication Ordinance, Appellant filed a letter dated January 24, 1966, requesting the motion picture "VIVA MARIA" to be classified as "suitable for young persons". This request was considered by the Classification Board on January 25, 1966, and the Board requested a screening of this film. After viewing the film on February 7, the Board, in its open public hearing of February 9, determined that the motion picture "VIVA MARIA" should be

properly classified as "not suitable for young persons". The Exhibitor was notified of the Board's action by letter dated February 9, 1966, and the Exhibitor notified the Board of its non-acceptance of the Board's classification by letter dated February 11, 1966. As required by this Classification Ordinance, on February 14, 1966, within three (3) days of the Exhibitor's notice of non-acceptance, the City of Dallas petitioned the Dallas District Court for a temporary and a permanent injunction to enjoin this Exhibitor from exhibiting and advertising the motion picture "VIVA MARIA" without classifying it as "not suitable for young persons". The case was set for a hearing on February 17, 1966, and the City of Dallas offered to have it heard on either a temporary or a permanent injunction. The Exhibitor refused the offer to have the case heard on a permanent injunction. The case was heard as a trial de novo and not as an appeal from an Administrative Order or Decision. The City of Dallas carried the burden of proving that the motion picture was in fact "not suitable for young persons". After hearing the evidence and viewing the entire film, the trial Court found that the motion picture "VIVA MARIA" was in fact "not suitable for young persons" and entered its judgment on February 18, 1966, enjoining the Appellant from exhibiting or advertising the film contrary to that finding.

The trial Court's decision in this case was appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and after the submission of briefs by all the parties, the Appellate Court viewed the entire film, heard oral arguments, and rendered its judgment and a writ-

ten opinion on April 5, 1966, *Interstate Circuit, Inc., et al. v. City of Dallas*, 402 S.W. 2d 770, writ of error refused. It is from this judgment and opinion by the Court of Civil Appeals that this Appellant is appealing.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

(1) The Dallas Motion Picture Classification Ordinance, both on its face and as applied in this case, provides the Exhibitor, the Appellant herein, a prompt judicial determination in compliance with the requirements as set forth in *Freedman v. State of Maryland*, 380 U.S. 51. Although the Freedman case dealt with the complete prohibition of the exhibition of a motion picture under the Maryland *Censorship* Statute, as opposed to *classification* of motion pictures under the Dallas Ordinance, the record in this case is abundantly clear that a prompt judicial review was afforded the Exhibitor.

The Court of Civil Appeals spoke to the issue of prompt judicial review in its opinion on this same case, stating on page 774 (Appellant's Apendix A, Page 8):

> "The case now before us was filed in the trial court February 14, 1966, tried February 18, 1966, submitted to this Court March 28, 1966 and decided April 5, 1966. Appellants surely have no real basis to complain that the judicial procedural timetable has been inadequate to meet the requirements set out in the Freedman case."

As pointed out, Appellant received a final, speedy judicial determination in the trial Court within one (1) week. Appellant received a judgment and opinion from the Court of Civil Appeals within seventeen (17) days from the date of

filing its brief with the Court. (Interstate's Brief filed in Court of Civil Appeals on March 19, 1966, and the Court of Civil Appeals' Judgment and Opinion rendered on April 5, 1966, Appellant's Appendix C, pages 1 and 2.)

Section 46A-7 of the Dallas Motion Picture Classification Ordinance, entitled "Judicial Review" (Appellant's Appendix B, Page 16), sets forth the provisions for a prompt judicial review and determination required under the Ordinance. The City of Dallas *must* comply with these provisions in order to enforce the Ordinance. The Ordinance itself provides that unless this strict timetable is compiled with, the Board's classification is suspended (Section 46A-7(b), Appellant's Appendix B-19). Either the Exhibitor gets its speedy judicial review or it may exhibit the film without classification. The requirements for Constitutional safeguards as set out by this Court in the *Freedman* case are obviously complied with by the provisions for judicial review in the Dallas Ordinance.

As pointed out above, the Dallas Ordinance not only provides for a prompt judicial determination as to whether or not the motion picture is properly classified; but, in addition, the ordinance demands that the City of Dallas cooperate with the Exhibitor in its effort to obtain a speedy appeal, if requested to do so. Even though the City of Dallas was not requested to do so, it cooperated with the Exhibitor at every step in its effort to obtain a speedy appellate review, and Appellant in this case admits this cooperation. (Appellant's Jurisdictional Statement, Page 8).

The City of Dallas agrees with Appellant where it states that *Jacobellis v. State of Ohio*, 378 U.S. 184, stands for the principle that the Supreme Court must view the subject matter in censorship cases to make an independent judgment as to whether it is obscene or constitutionally protected; however, the *Jacobellis* case and other censorship cases are dealing with the *total prohibition* of the subject matter. There is absolutely no provision in the Dallas Classification Ordinance for the prohibition of the exhibition of any motion picture or the prohibition of the dissemination of any material. The Ordinance does provide for the classification of motion pictures. As opposed to a censorship statute, the Dallas Ordinance does not attempt to tamper with anyone's work product, nor his right to speak or make a motion picture, but only to classify adult entertainment as such. Thus the distinction between this case and the *Jacobellis* case is abundantly clear.

The Appellant's argument that the Supreme Court of Texas relied on *Janus Films, Inc. v. City of Fort Worth*, 358 S.W. 2d 589, to avoid a decision in this case is wholly speculative. The Court merely found no reversible error in the decision of the Court of Civil Appeals and thereby made its independent decision.

(2) The Dallas Motion Picture Classification Ordinance does not prohibit the free exhibition of motion pictures, and the standards for classification of motion pictures as provided by the Ordinance are not vague and indefinite. Not being a censorship ordinance which would totally prohibit the exhibition of motion pictures, the Dallas Ordinance does

not attempt to determine whether or not a motion picture is obscene.

In drafting this classification ordinance, the City of Dallas has attempted to follow the language and decisions of this Court. In the *Jacobellis* case, *supra*, at page 195, this Court stated:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children.' *Butler v. Michigan*, 352 U.S. 380, 383, 1 L. Ed. 2d. 412, 414, 77 S. Ct. 524. *State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.*" (Emphasis ours)

In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, this Court held that the state has an interest in the welfare of children and that even the family itself is not beyond regulation in the public interest. This Court pointed out in *Bantam Books v. Sullivan*, 372 U.S. 58, 70, that a system of prior restraint would be tolerated if conditions of proper "judicial superintendence" and "an almost immediate judicial determination of the validity of the restraint" were met, and these conditions have been met by the Dallas Ordinance.

Again in *Kingsley Books v. Brown*, 354 U.S. 436, this Court pointed out that the liberty of speech is not an absolute right with no limitations whatever.

Even in obscenity cases, this Court has not required impossible standards but only that there be a sufficiently definite warning measured by common understanding and practices, *United States v. Petrillo*, 332 U.S. 1, 7, and *Roth v. United States;* 354 U.S. 476. Again in *Beauharnais v. Illinois*, 343 U.S. 250, 264, this Court held that the law was not so "ill defined" that men acting under a statute and judges and juries in applying it could not draw from it some adequate standards to guide them. This same reasoning was used by this Court in *American Communications Association v. Douds*, 339 U.S. 382, 412, when this Court stated:

> "* * * The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

The City of Dallas has aimed its legislation at young persons under the age of sixteen (16) and has drafted its standards for classification in accordance with the decisions of this Court.

Appellant makes reference to the case of *Interstate Circuit, Inc., et al. v. City of Dallas*, 249 Fed. Supp. 19 (Northern District of Texas), which was affirmed by the United States Court of Appeals for the Fifth Circuit in *Interstate Circuit, Inc., et al. v. City of Dallas*, 366 Fed. 2d 590, both cases holding that the Dallas Motion Picture Classification Ordinance was constitutional but limited the standard for classifying films to those that were obscene when viewed by an audience of young people. The lower Federal Courts did recognize the doctrine of variable obscenity; however,

the City of Dallas has filed a Petition for Writ of Certiorari, *City of Dallas v. Interstate Circuit, Inc., et al.*, Cause No. 978,[1] requesting this Court to sustain the classification standards as set forth in the Dallas Ordinance. In this regard, if there be a substantial Federal question as to the validity of the classification standards of the Dallas Motion Picture Classification Ordinance, that question could be properly resolved by this Court by granting the Writ of Certiorari already pending before this Court.

(3) Appellant's third question deals with several questions of fact. These questions were presented to both the trial Court and the Court of Civil Appeals, and after viewing the entire movie, both Courts, based on independent findings and conclusions, decided that the motion picture "VIVA MARIA" was in fact "not suitable for young persons".

Normally, this Court will not exert its jurisdiction to review questions of fact. *Grayson v. Harris*, 267 U.S. 352, 358; *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160.

Appellant attempts to convince this Court that "sacreligious" was a basis for classifying the motion picture "VIVA MARIA", and has taken some testimony of Mr. John Gilliland, a Board member, out of context in an effort to prove this. A reading of Mr. Gilliland's entire testimony (State-

[1] Interstate Circuit, Inc., et al., a number of motion picture Exhibitors in Dallas and parties to the above referenced case decided by the United States Court of Appeals for the Fifth Circuit, also filed a Petition for Writ of Certiorari in a proceeding styled *Interstate Circuit, Inc., et al. v. City of Dallas*, Cause No. 971.

ment of Facts, page 11 through page 51) clearly reveals that the basis for the classification by the Board was "sexual promiscuity". There is no testimony that the Board discussed "sacreligious" conduct in its determination of the classification of this picture. Mr. Gilliland specifically denied considering it, and it is mere conjecture that anyone else considered sacrilege (Statement of Facts, page 38, lines 18 and 19, and Appellant's Appendix C, Page 15).

When Reverend Maceo limited the contemporary community standard to the City of Dallas, he may have been mistaken. However, he based his opinion on the young people he knew and worked with, and there is no reason to assume that objectionable material would be more or less detrimental to young persons within the City of Dallas than in other parts of the country. The record is devoid of evidence that other Board members limited the contemporary community to the City of Dallas.

These arguments were urged in the trial Court and the trial Judge was adequately apprised of the appropriate Supreme Court decisions and the Court made the independent finding that the motion picture "VIVA MARIA" was in fact "not suitable for young persons".

Additionally, the trial Court found that there were two or three features, *not scenes*, that would make the picture unsuitable for young people. It is obvious he was referring to the sexually promiscuous conduct which ran throughout the entire film.

All of these fact questions were urged and argued before the Court of Civil Appeals at Dallas. After hearing oral

arguments, reviewing all the evidence, reading the briefs submitted by all parties, and viewing the entire film, the Court of Civil Appeals found that the motion picture "VIVA MARIA" was in fact "not suitable for young persons", with full knowledge of the holdings of this Court.

Thus, it is respectfully submitted that the Dallas Motion Picture Classification Ordinance, both on its face and as applied in this case, does not offend the First and Fourteenth Amendments to the Constitution of the United States.

APPELLANT'S FIRST QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY AND PROPERLY RAISED

No jurisdiction exists to review the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas with regards to Appellant's first question dealing with the prompt final judicial review.

On Page 6 of Appellant's Jurisdictional Statement, Appellant states that in its answer and cross-action filed in the trial Court it alleged that the Dallas Motion Picture Classification Ordinance did not provide a prompt final judicial determination. Appellant has included this portion of its answer in Appendix C, Pages 10 and 11. Although no findings of fact and conclusions of law were rendered, the trial Court obviously ruled against the Appellant on this point because it granted the injunction as sought by the City of Dallas.

However, in its appeal to the Court of Civil Appeals, the Appellant did not assign as error the trial Court's adverse ruling to its contention of no prompt judicial review,

but the Court of Civil Appeals did expressly answer the question of prompt judicial review in its opinion on Page 774 (Appellant's Appendix A, Page 8).

Notwithstanding this express ruling by the Court of Civil Appeals, Appellant again abandoned its contention of no prompt judicial review in its Motion for Rehearing to the Court of Civil Appeals. Again, Appellant failed to properly assign as error this question decided adversely to it, but this time in the face of an expressed and unequivocal adverse ruling by the Court of Civil Appeals. The Texas Rules of Civil Procedure require proper assignment of error in the Motion for Rehearing in the Court of Civil Appeals as a prerequisite to appeal to the Supreme Court of Texas by Application for Writ of Error. Texas Rules of Civil Procedure, Rule 469(c)[2].

[2] Texas Rules of Civil Procedure—Rule 469:
Requisites of Application for Writ of Error.

"The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect, in order to reduce the work of the Court. The respondent is urged to file a reply.

"The application for writ of error shall be addressed to 'The Supreme Court of Texas', and shall state the name of the party or parties applying for the writ. The parties shall be designated as 'Petitioner', and 'Respondent'. The application shall contain the following:

* * *

"(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court."

In its Application for Writ of Error submitted to the Supreme Court of Texas, Appellant again failed to assign error to the Court of Civil Appeals' decision that the Dallas Ordinance did provide a prompt judicial review, both on its face and as applied in this case. Thus, the Appellant has failed to properly perfect its appeal under the Texas Rules of Civil Procedure as to whether the Dallas Ordinance provides a prompt judicial review, *Moore v. Dilworth*, 179 S.W. 2d 940 (Sup. Ct.); *East Texas Motor Freight Lines v. Loftis*, 223 S.W. 2d 613 (Sup. Ct.).

Not only is Appellant required to timely assert the federal question, but it is also required to pursue it throughout the litigation in all steps of appeal. It is not proper to present it to the highest State Court for the first time on a Petition for Rehearing. *Hanson v. Denckla*, 357 U.S. 235, 243-4; *Herndon v. Georgia*, 295 U.S. 441, 443; *American Surety Co. v. Baldwin*, 287 U.S. 156; *Forbes v. State Council*, 216 U.S. 396; *Simmerman v. Nebraska*, 116 U.S. 54.

CONCLUSION

The decision of the Texas Court of Appeals as set forth in Appendix A, Pages 1 through 21, of Appellant's Jurisdictional Statement, which was in effect affirmed by the Supreme Court of Texas by that Court's denial of Appellant's Application for Writ of Error, is in all respects cor-

rect, and upon that opinion and for the foregoing reasons, Appellant's appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Motion to Dismiss has been served upon Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, Attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them in their offices located at 3525 Southland Center, Dallas, Texas, and Mr. Dan McElroy and Mr. Paul Carrington, Attorneys for Appellant-Intervenor, United Artists Corporation, by delivering the same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas.

N. Alex Bickley
N. ALEX BICKLEY,
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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1109~~ 56

INTERSTATE CIRCUIT, INC., et al.,
Appellant,

v.

CITY OF DALLAS,
Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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v.

CITY OF DALLAS,

Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee City of Dallas has asked that this appeal be dismissed because a substantial federal question is not presented and because the first question was not timely and properly raised.

The first question is found on page 3 of the Jurisdictional Statement. From the beginning of the litigation, Appellant has claimed that Dallas City Ordinance No. 11284 did not guarantee a prompt final judicial decision to confirm the ac-

tion of the Board. In the trial court, as defendant, it raised this point by special exception (Appendix C-10 and 11); and in that court as cross-plaintiff it raised the same point as grounds for the injunctive relief which it sought. (Appendix C-13 and 14).

Since this case was a non-jury trial, no motion for rehearing was required, Tex. Rul. Civ. Proc. 418b and 374. As an appeal from an order granting a temporary injunction against appellant, no Finding of Facts and Conclusions of Law were required. Tex. Rul. Civ. Proc. 385e.

To avoid encumbering this record by the repetition of points covered in its original brief, which were repeated in the motion for rehearing, Appellant said, "A Motion for Rehearing by Interstate re-urged the identical points of the first brief. (Appendix C, p. 22.)" This statement is unchallenged by appellee. The Petition for Writ of Error brought forward the same constitutional points.

In every court below Appellant has urged its contention that the ordinance did not guarantee a prompt final judicial determination to satisfy the requirement of *Freedman v. State of Maryland*, 380 U.S. 51 (1965). In its Motion to Dismiss, the City concedes that the Court of Civil Appeals considered the point. (Motion to Dismiss, p. 12).

This court in *People of State of New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), said:

> "* * * no particular form of words or phrases is essential, but only that the claim of invalidity and the grounds therefor be brought to the attention of the

> state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

At every level in the state courts Apellant has presented its contention that the ordinance does not satisfy the requirements of *Freedman*.

The federal questions are substantial. Appellee's claim that this is a "classification" ordinance "and not a censorship ordinance" doesn't change its character. A cursory reading shows that it restricts free communication to persons under sixteen. There is the obvious dispute as to whether this procedure is constitutional. The infringements of Appellants rights under the First and Fourteenth Amendments presented as questions on page 3 of the Jurisdictional Statement are substantial federal questions.

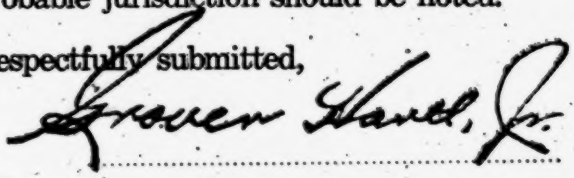
The Appellee's statement on page 6 of its Motion to Dismiss—"Even though City of Dallas was not requested to do so, it * * * cooperated * * * (Appellant's Jurisdictional Statement, Page 8.)" deserves comment. Attorneys for the City promised cooperation from the beginning of this litigation. They are honorable lawyers. Appellant believed them. They kept their promise without written request or demands. The City deserves no credit for promises kept; Appellant was not derelict in its trust. The quoted statement without this explanation may lead to the inference that Appellant didn't try to push its appeal in state court for prompt, final judicial decision.

The only conclusion properly drawn is that diligent attorneys for the City of Dallas and an exhibitor cannot get the Texas courts to give a prompt final judicial determination on a decision of the classification board.

Neither the City of Dallas nor Interstate has the authority to enact a statute providing for prompt judicial determination; they, even by joint effort, cannot get a priority hearing from the Supreme Court of Texas.

The questions presented here are substantial and properly before the Court. Probable jurisdiction should be noted.

Respectfully submitted,



GROVER HARTT, JR.,

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PROOF OF SERVICE

I, Grover Hartt, Jr., one of the attorneys for Interstate Circuit, Inc., Appellant herein, and a member of the Bar of The Supreme Court of the United States, hereby certify that, on the 13th day of April, 1967, I served copies of the foregoing Appellant's Brief in Opposition To Motion to Dismiss on the several parties thereto, as follows:

1. On Appellee City of Dallas, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. N. Alex Bickley, City Attorney, 301 Municipal Building, Dallas, attorney of record for the City of Dallas:

2. On Intervenor United Artists Corporation, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. Paul Carrington, 1900 Mercantile Dallas Building, attorney of record for United Artists Corporation.

Grover Hartt, Jr.

GROVER HARTT, JR.,
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SUPREME COURT, U. S.

OCT 2 1967

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In the

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OCTOBER TERM, 1967

No. 56

INTERSTATE CIRCUIT, INC.,

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CITY OF DALLAS,

Appellee.

On Appeal From the Court of Civil Appeals
For the Fifth Supreme Judicial District of Texas
Sitting at Dallas

BRIEF OF APPELLANT INTERSTATE CIRCUIT, INC.

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 56

INTERSTATE CIRCUIT, INC.,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal From the Court of Civil Appeals
For the Fifth Supreme Judicial District of Texas
Sitting at Dallas

BRIEF OF APPELLANT INTERSTATE CIRCUIT, INC.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, sitting at Dallas (R. 161-172) is reported in 402 S.W. 2d 770. A concurring opinion (R. 172-177) by Judge Bateman is reported at 402 S.W. 2d 777. There is no opinion by the 44th District Court of Dallas County, Texas, which tried the case. The judgment of that court appears at R. 155-156.

JURISDICTION

The jurisdiction of the Supreme Court in invoked pursuant to 28 U.S.C. §1257-(2).

This suit was brought by the City of Dallas, seeking a temporary injunction to affirm the decision of the Dallas Motion Picture Classification Board, which had classified the motion picture, *Viva Maria*, as "not suitable for young persons".

The judgment of the 44th District Court of Dallas County, Texas, affirming the decision of the Board, was entered on February 18, 1966. R. 155-156. The judgment entered that day included a Notice of Appeal by Interstate, and within the time prescribed by law, the case was brought before the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, sitting at Dallas. On April 5, 1966, that court affirmed the judgment of the district court. There was an opinion by that court, (R. 161-172) and a concurring opinion (R. 172-177).

Following the judgment of the Court of Civil Appeals, (R. 178) Interstate filed its Motion for Rehearing which was overruled on April 25, 1966. A Petition for Writ of Error was filed in the Supreme Court of Texas. This was overruled with the endorsement "Writ Refused, No Reversible Error" on July 27, 1966. R. 182. A Motion for Rehearing and a Supplemental Motion for Rehearing were filed in that court. On October 19, 1966, the Motions for Rehearing were overruled by the Supreme Court of Texas (R. 188), making the judgment of the Court of Civil Ap-

peals final. The sequence of filing of these various motions is all shown in a Chronology Table found in Appendix A of this brief.

The Notice of Appeal to the Supreme Court of the United States was filed on January 11, 1967. R. 189. The Record and Jurisdictional Statement were filed with this Court on March 3, 1967, and probable jurisdiction was noted on May 15, 1967.

QUESTIONS PRESENTED

1. Whether Dallas City Ordinance 11284 is unconstitutional because it does not guarantee a prompt, final judicial decision to review actions of the Dallas Motion Picture Classification Board in classifying a motion picture as "not suitable for young persons"?

2. Whether Dallas City Ordinance 11284 is unconstitutional because it prohibits the free exhibition of motion pictures on standards that are vague and ambiguous instead of limiting the restraint on free exhibition to those pictures which are obscene as that term has been defined by this Court?

3. Whether the Dallas Motion Picture Classification Board and the lower courts each applied unconstitutional standards in classifying the motion picture, *Viva Maria*, as "not suitable for young persons"? As sub-parts of this question, it should be determined, (a) whether the members of the Dallas Motion Picture Classification Board used the term "sacrilegious" as a basis for determining that the picture was "not suitable for young persons"; (b) whether the

members of the Classification Board used the geographic area of the City of Dallas in determining the community standard; and (c) whether the members of the Classification Board and the lower courts based their conclusion that the picture was not suitable upon a few isolated scenes rather than considering the dominant theme of the picture as a whole.

STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, Article I, Section 8 of the Texas Constitution, Article 527 of the Texas Penal Code, and Dallas City Ordinance 11284 are involved in this case. These are set forth in Appendix B to this brief.

STATEMENT

This suit involved a motion picture, *Viva Maria*, (the picture was viewed by the trial court, R. 155, and by the Court of Civil Appeals, R. 170) and the classification of this picture "as not suitable for young persons" by the City of Dallas under the provisions of Ordinance 11284. R. 137-140 and R. 1-3.

This classification resulted in partial censorship of the motion picture here in question because it could not be shown to persons under sixteen years of age except when they were accompanied by their parents, guardian or spouse.

The parties to this appeal are Interstate Circuit, Inc., a corporation engaged in the exhibition of commercial motion pictures in Dallas and other Texas cities, and United Artists

Corporation, Intervenor, a corporation engaged in the distribution of commercial motion pictures in Dallas and other Texas cities, as Appellants, and the City of Dallas as the Appellee.[1]

Ordinance 11284 was passed on November 22, 1965. R. 133. The ordinance created the Dallas Motion Picture Classification Board and gives to the Board certain standards for determining whether a motion picture is suitable or not suitable for young persons. R. 121-122. A young person is defined as any person who has not attained his sixteenth birthday. R. 121.

In deference to the standards set forth in *Freedman v. State of Maryland*, 380 U.S. 51 (1965), there is included in the ordinance a section entitled "Judicial Review". R. 128-132. If the exhibitor does not accept the "not suitable for young persons" classification, the ordinance requires the City to file suit to enjoin the showing of the picture unless advertised as so classified. Should the exhibitor appeal from an adverse decision of the trial court, the ordinance requires the City to file responsive pleadings within periods of time less than allowed by the Texas Rules of Civil Procedure and to join with the exhibitor in motions asking trial and appellate courts in Texas to advance the case. R. 128-132.

The present case arises under the ordinance. There is a chronology table included in Appendix A showing the dates that the relevant events transpired. This chart reflects that

[1] United Artists, Inc. perfected a separate appeal to this Court styled *United Artists Corporation, Appellant vs. City of Dallas, Appellee*, being No. 64 on the docket of this Court in the October Term for 1967.

prior to February 14, Interstate applied for a license to exhibit *Viva Maria* for a general audience, and that after a hearing, the picture was classified as "not suitable for young persons". A notice of non-acceptance was filed by Interstate, and on February 14, the present suit was brought by the City of Dallas. R. 1.

In response to the City's petition, Interstate filed an Answer and Cross-Action (R. 16), raising the constitutional questions that (1) the ordinance establishes a system of prior restraint and censorship of communication (R. 19), (2) the terms for classifying motion pictures provided in the ordinance are vague and indefinite, and not limited to obscenity (R. 20), and (3) the ordinance does not provide for a prompt, final judicial determination as to the validity of the classification. R. 20-21. In further answer, Interstate pleaded that commercial motion pictures are protected by Article 527 of the Texas Penal Code. R. 22-23. As Cross-Plaintiff, Interstate, raising the same points, sought a judgment to declare the ordinance invalid and injunctive relief against the enforcement of it. R. 25-27.

At the conclusion of the trial, the Court entered a temporary injunction against Interstate, prohibiting the showing of the motion picture, *Viva Maria*, without the notation that it is "not suitable for young persons". Following a Motion to Advance (R. 157) in which the City joined, the Court of Civil Appeals set the case for hearing on March 28 (R. 160) and on that day, the court viewed the picture and heard oral argument. Chronology Table, Appendix A. The judgment of that court affirming the temporary in-

junction (R. 178) together with written opinion (R. 161) and concurring opinion (R. 172) was rendered on April 5. R. 178, 161 and 172. A Motion for Rehearing by Interstate reurged the identical points of the first brief. This motion was overruled on April 25. Chronology Table, Appendix A.

SUMMARY OF ARGUMENT

Two weeks before the present ordinance was passed, the United States District Court in Dallas declared a prior city ordinance classifying motion pictures to be unconstitutional. *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906 (N.D Tex. 1965). In that decision, a finding was made that there was no provision in the Texas statutes for a prompt judicial review in the trial and appellate courts, and experience was that the risk of delay is built into the Texas procedure. The City of Dallas sought to provide a system of judicial review in the present ordinance by promising its cooperation in joining for motions to advance cases on the trial and appellate docket and waiving the time it would ordinarily be allowed for responsive pleadings.

Viva Maria was the first motion picture classified as "not suitable for young persons" under Dallas Ordinance 11284. Following a notice from Interstate that it did not accept this classification of the picture it intended to exhibit, suit was brought by the City on February 14, 1966. It was not until October 19, of that same year, that the Texas Supreme Court denied a Motion for Rehearing on an application for Writ of Error. On that date the judgment of the Court of Civil Appeals confirming the City's action became final. It is the contention of Interstate that the ordinance does not

provide a prompt, final judicial review as required by *Freedman v. State of Maryland*, 380 U.S. 51 (1965).

The present case on *Viva Maria* gave the ordinance a fair test. Both the City and the two appellants gave full cooperation. The system simply did not work.

The ordinance here, like its predecessor, does not profess to censor for obscenity either for an adult audience or for young persons. The present ordinance defines "young persons" as those who have not reached a sixteenth birthday. The prior ordinance defined the same term as those who have not reached an eighteenth birthday. "Not suitable for young persons" is defined as portraying brutality, depravity, sexual promiscuity, nudity, etc., in such a manner as to incite crime on the part of, or arouse the prurient interest of, young persons. In a concluding section, the members of the censor board are instructed to weigh the "harmful effects" of the picture against the artistic or educational value which the film may have.

The opinion declaring the first ordinance unconstitutional turned upon the lack of a prompt judicial review. It gave approval to the definition of "not suitable for young persons" if that term, as to films in question, were interpreted to mean "only those, which to an audience of young persons, as defined in the Ordinance, are obscene when presented in a salacious manner." *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906, 910 (N.D. Tex. 1965). The same definition of "not suitable for young persons" was incorporated in the second ordinance, and was given approval by the same court in a second suit for an injunction against its en-

forcement. An appeal was taken to the United States Court of Appeals for the Fifth Circuit and from that decision a Petition for Certiorari is pending before the Court in a proceeding styled *Interstate Circuit, Inc. et al. v. City of Dallas*, Cause No. 42. The terminology, "obscene when viewed by an audience of young persons", originated in the opinion of the United State District Court, *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19, 24 (N.D. Tex. 1965), and was used as a second ground for sustaining the ordinance by the Texas Court of Civil Appeals in its opinion in the present case. That was done only, however, after the ordinance definition of "not suitable for young persons" had been approved. R. 170.

The definition of obscenity found in *Roth v. United States*, 354 U.S. 476 (1957) has been construed by recent decisions so that the "average person" would include the meaning of the "average person that is its intended and probable recipient group", or words of similar import. This is allowed if the material is directed to a clearly defined deviant sexual group.

Interstate contends that children are not a clearly defined deviant sexual group as that term is ordinarily used. Further, the ambiguous terms used in the definition of "not suitable for young persons" are too vague for lawful censorship. In addition to this, the Court should not give approval to an ambiguous new standard by allowing a censorship proceeding to be directed against "young persons". This term has only the meaning which is given to it by the party

using the phrase, whether it be a legislature, a city council, or a court.

To approve a new definition of "obscenity" which provides "a film that is obscene when viewed by an audience of young persons is one which, to the average young person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests, substantially goes beyond the customary limits of candor in description or representation of such matters to the average young persons, and is utterly without redeeming social importance", *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19, 24 (N.D. Tex. 1965), is to argue in a circle. Similar definitions could be made to describe material obscene for persons in categories based upon age, rank, sex, situation, or condition of life. It is neither feasible nor practical to have these various mutations of obscenity engrafted as a constitutional doctrine.

The Clasification Board and the Texas courts used standards other than "obscenity" in determining that *Viva Maria*, an innocuous comedy, was not suitable for young persons. One member of the board admitted that the term "sacrilegious" was considered in its classification. Another admitted that he had no experience in judging contemporary community standards outside of the City of Dallas. The trial judge said that he based his decision on a few isolated scenes in the picture. The Court of Civil Appeals found that it had "a minimum of social value." The Supreme Court of Texas did not view the picture.

ARGUMENT

I.

Ordinance 1284 Does Not Assure a Prompt Final Judicial Decision to Review the Acts of the Dallas Motion Picture Classification Board

Freedman v. State of Maryland, 380 U.S. 51 (1965) recognized that motion pictures have been protected by the First Amendment since the decision in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). But, it indicated that a system of prior restraint, where a censor board could deny a license to exhibit a motion picture, might be approved if the exhibitor were given the protection of a prompt, final judicial review of the board's action. As the Court states in *Freedman*, on pages 58-59:

> "To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See Bantam Books, Inc. v. Sullivan, supra. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

Ordinance 11284 does not give the protection required by the *Freedman* case. The present case was filed on February 14, 1966, (R. 1) in the Texas District Court, but it was not

until 247 days later, on October 19, 1966, (R. 188) that the Texas Supreme Court denied a Motion for Rehearing on a Petition for Writ of Error. This action made the decision of the Court of Civil Appeals (R. 161) final.

It is important to remember that Ordinance 11284 was the second censorship ordinance passed by the City of Dallas in 1965. The first ordinance passed was No. 10963, which was passed on April 5. It was declared unconstitutional in *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906 (N.D. Tex. 1965).[2]

No appeal was taken from that decision which made the following Finding of Fact, on page 909:

> "VIII.
>
> The statutes of Texas and the Texas Rules of Civil Procedure, when applied to the Ordinance before the Court, do not provide for a speedy judicial review of the rights of the Plaintiffs sufficient to satisfy the requirements of the case of Freedman v. State of Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965)."

and which expressed the following Conclusion of Law, on page 911:

> "XIII.
>
> Regardless of whether the injunction provided for in Section 46A-7 of the Ordinance involved herein is interpreted as temporary or permanent, there being no provision in the Texas statutes for prompt judicial review in the trial and appellate courts, and experience being that risk of delay is built into the Texas procedure, the Ordinance in question lacks sufficient procedural safeguards designed to obviate the dangers of a censorship system. Freedman v. State of Maryland,

[2] Ordinance 10963 is quoted in its entirety beginning on page 912 of the opinion. Section 46A-7 of the ordinance on *Judicial Review* is found on page 917.

380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). Compare Trans-Lux Distributing Corp. v. Maryland State Board of Censors, 213 A. 2d 235 (Md. Sept. 27, 1965)."

Ordinance 11284 was passed on November 22, 1965. R. 119, 133. The Dallas exhibitors again brought suit in the federal court seeking an injunction against the enforcement of this second ordinance. From adverse decisions in the lower courts, plaintiffs are now seeking a Writ of Certiorari in *Interstate Circuit, Inc., et al. v. City of Dallas*, No. 42, October Term, 1967. It is necessary to trace that litigation briefly. On December 23, 1965, the United States District Court denied the plaintiffs an injunction against the enforcement of Ordinance 11284 in *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19 (N.D. Tex. 1965). Findings of Fact VII through X of that opinion[3] are the basis for hold-

[3] Page 23. They are:

"VII.

Section 46, A-7 entitled 'Judicial Review', in case of non-acceptance of the Board's classification, requires the Board to take steps to obtain a judicial review of the Order of the Board, provides a timetable for Court action by the Board, and requires the Board to waive notice of certain court proceedings.

"VIII.

District Courts in Dallas County, Texas have made it a practice to give preferential settings to cases in which the City of Dallas is a party, particularly those involving the public welfare.

"IX.

The Appellate Courts of Texas have likewise made it a practice to advance cases involving the public welfare and the need for immediate action.

"X.

In cases where the exhibitor-defendant loses before the Board, in the District Court, and in the Court of Civil Appeals, under the timetable provided by the Ordinance in question and under the customary procedure in the Texas Courts, a final decision in the Supreme Court of Texas could be obtained in less than thirty-five days."

ing that the ordinance satisfied the requirements of a prompt, final judicial review.

While that case was being appealed to the United States Court of Appeals for the Fifth Circuit, the present suit involving *Viva Maria* was filed on February 14, 1966. Reference to Appendix A shows the sequence of the proceeding in this case. The case before the Fifth Circuit was decided August 30, 1966. *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590. In that decision, affirming the denial of an injunction, the Court referred to the finding in the District Court that a final judgment in the Texas courts could be obtained in thirty-five days. This opinion mentioned the action of the Texas Supreme Court in denying a Writ of Error. (p. 601, footnote 22). The writ was refused on July 27. R. 182. On that date the *Viva Maria* case had been in the Texas courts one hundred sixty-three days, but this fact was ignored.

Interstate understands that the assurance of judicial review required by *Freedman* must be furnished by statute or authoritative judicial construction.

The City's system for judicial review which it seeks to sustain here was given a fair test by the parties in this case. The City cooperated by filing pleadings promptly. Equally true, there is no contention in the record that either Interstate or United Artists caused delay. The system does not provide for a prompt judicial review that gives a final determination by the Supreme Court of Texas in thirty-five days; to the contrary, more than eight months had elapsed between the time the *Viva Maria* suit was filed and October 19, the date that a final judicial determination was obtained.

Whether right or wrong, the decision by the Texas Supreme Court was so long delayed that the most propitious opportunity for the exhibition of the picture was long passed.

The *Freedman* opinion pointed to *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1956), which required a hearing within one day and provided for an opinion within two days thereafter. After *Freedman*, Maryland took steps to provide for a system of prompt judicial review. This procedure was upheld in *Trans-Lux Distributing Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A. 2d 235 (1965).

Neither *Kingsley Books v. Brown* nor *Trans-Lux v. Maryland State Board of Censors* required thirty-five days for a judicial determination of the censor's actions.

Dallas does not have the power to cure the defect in this ordinance. Both the first and the second ordinances sought to provide a system of judicial review to satisfy the requirements of *Freedman*. Lacking the power of a state legislature to pass a statute, and the power of an appellate court of Texas to make an authoritative judicial construction, the City promised its best efforts and cooperation to the local exhibitors in order for it to have a censor board to classify motion pictures as "not suitable for young persons". This was not enough to get a prompt, final judicial decision.

As the Court stated in *Freedman:*

> "Although the Court has said that motion pictures are not 'necessarily subject to the precise rules governing any other particular method of expression', Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502, 72 S. Ct. 777, 781, 96 L. Ed. 1098, it is as true here as of other forms of expression that '[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'

> Bantam Books, Inc. v. Sullivan, supra, 372 U.S. 70, 83 S. Ct. 639. '* * * [U]nder the Fourteenth Amendment a state is not free to adopt whatever procedure it pleases for dealing with obscenity * * * without regard to the possible consequences for constitutionally protected speech.' Marcus v. Search Warrant, 367 U.S. 717, 731, 81 S. Ct. 1708, 1716, 6 L. Ed. 2d 1127." 380 U.S. 51, 57.

This quotation summarizes the policy of the Court developed in many cases. *Freedman* does not forbid censorship of motion pictures, but indicates that it will be tolerated if strong safeguards are assured. It is the City's burden to show (1) that Ordinance 11284 assures a prompt, final judicial decision from the Texas courts, and (2) that a two hundred forty-seven day proceeding is a prompt judicial decision.

There are various provisions found in Texas law for advancing cases and giving statutory preferences.[4]

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[4] Article 1738a Tex. Rev. Civ. Stat. provides:

> "From and after January 1, 1944, appeals may be taken direct to the Supreme Court of this State from any order of any trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality or unconstitutionality of any statute of this State, or on the ground of the validity or invalidity of any administrative order issued by any State Board or Commission under any statute of this State. It shall be the duty of the Supreme Court of this State to prescribe the necessary rules to be followed in perfecting such appeal."

But, *McGraw v. Teichman*, 147 T. 142, 214 S.W. 2d 282 (1948) held that this statute did not give the Texas Supreme Court jurisdiction from a city's zoning board.

In connection with this statute, see Rule 499-a Tex. Rul. Civ. Proc.

By trying this case as a proceeding for a temporary injunction, certain preferential rules of procedure became applicable. Tex. Rul. Civ. Proc. 385 provides for filing the record in a shorter period of time than ordinary and that there should be no motion for new trial and that the trial judge need not file findings of fact or conclusions of law. Further, this would be an interlocutory matter to which the Court of Civil Appeals is required to give preferential treatment after four preceding classes of litigation. Tex. Rul. Civ. Proc. 410.

The Texas Legislature was in session when the *Freedman* opinion was announced in 1965. The session did nothing to establish a system of prompt judicial review for censorship cases as Maryland has done.

The 60th Legislature convened in regular session in January, 1967. It also did nothing about a system of judicial review for censorship cases. However, it did give a top priority and precedence to litigation arising under the Managing General Agents Licensing Act. [5]

If *Freedman* is correctly understood to require that any system of prior restraint, such as has been established by

[5] 60th Legislature, Chapter 757,5 Vernon's Texas Session Law Service 2048, 2051, §14 of that Act provides

> "Sec. 14. Judicial Review of Acts of Commissioner and the Board. If the commissioner shall refuse an application for license as provided in this Act, or shall suspend, revoke or refuse to renew any license at a hearing as hereinabove provided, and such action is upheld upon review to the board as in this Code provided, and if the applicant or accused thereafter be dissatisfied with the action of the commissioner and the board he may appeal from such action by filing suit against the commissioner and the board as defendants in any of the district courts of Travis County, Texas, or in any district court in the county of applicant's residence, and not elsewhere, within 20 days from the date of the order and action of the said board.
>
> "*Said action shall have precedence over all other causes of a different nature on the docket.* Upon the filing and perfection of such appeal, orders of the commissioner and the board shall be suspended and held for naught until a final court order or decree affirming such action. This appeal shall not be limited to questions of law and shall be tried and determined upon trial de novo to the same extent as now provided in the case of an appeal from the justice court to the county court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court having jurisdiction of said cause and *said action so appealed shall have precedence in said appellate court over all causes of a different character therein pending.* The commissioner and the board shall not be required to give any appeal bond in any cause arising hereunder." (Emphasis added)

Ordinance 11284, must assure by statute or authoritative judicial construction that the censor will bring suit and that the case will be prosecuted to assure a prompt, final judicial decision, then it clearly appears that the State of Texas does not have such a system. It is to be noted that the Supreme Court of Texas had this case under consideration for approximately four and one half months. On June 6, 1966, the joint Motion to Advance was filed. R. 180. Apparently, this motion received no consideration because it was on July 27, 1966, that the application for Writ of Error was denied, "Refused, No Reversible Error." R. 182.

This notation is provided for in Tex. Rul. Civ. Proc. 483. It is to be used in cases where the Supreme Court of Texas is not satisfied that the opinion of the Court of Civil Appeals has in all respects correctly declared the law, but is of the opinion that the application presents no error which requires reversal. According to the record of the *Viva Maria* case in the Texas Supreme Court, the opinion and the concurring opinion of the Court of Civil Appeals (R. 161) did not correctly declare the law, but the Supreme Court of Texas was of the opinion that no error was presented which required reversal.

At a time fixed by the court, Interstate and United Artists produced a print of *Viva Maria* and exhibited it in the courtroom of the Court of Civil Appeals. The opinion of that court reflects that this was done. R. 160, 170. It was part of the evidence in the case, and the Clerk of this Court requested a print of the picture for exhibition. It was furnished, and this Court also expects to see *Viva Maria*.

None of the parties of this litigation were ever called upon to show the picture to the Supreme Court of Texas, and that court denied a Writ of Error without taking the trouble to examine this most important piece of evidence which was in the record.

In *Jacobellis v. State of Ohio*, 378 U.S. 184, 188 (1964), the Court laid to rest all arguments relating to the right and duty of an appellate court to give final consideration to the decision of a jury or a lower court. The Court there states, on pages 187-188;

> "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. U.S., supra, 354 U.S. 497-498, 77 S. Ct. 1315-1316 (Separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' * * *"

The Texas Supreme Court has had two cases presented to it involving the question of censorship since *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), was decided in 1952. The first case was *Janus Films, Inc. v. City of Fort Worth*, 354 S.W. 2d 597 (Tex Civ. App. 1962). The opinion by the Court of Civil Appeals was the subject of the memorandum opinion by the Texas Supreme Court denying a Writ of Error, "Writ Refused, No Reversible Error", which is reported in 358 S.W. 2d 589. At the time of this decision in 1962, *Jacobellis* had not given the unequivocal mandate quoted above.

However, when the *Viva Maria* case was presented to that court in 1966, it could not perform its duty of applying the Constitution of the United States without seeing the picture. In fairness to the importance of the rights protected by the First Amendment which were involved in that case, that court should not have left them in limbo by an endorsement, "Writ Refused, No Reversible Error.".

Applying *Freedman* to the Texas judicial system, Interstate believes it is absolutely necessary that the Texas Supreme Court see the picture in dispute in order to provide for a prompt, final judicial determination that the action of the censor is correct. That court must face its judicial duty to uphold constitutional guarantees.

Since Ordinance 11284 could only secure the rights of Interstate and others by the City's promise of "best efforts", it appears that this is not enough. Lacking the power to provide for a system of prompt judicial review, the City of Dallas could only give a system of review that required two hundred forty-seven days for a final decision.

This case is a perfect demonstration of the importance of the requirements of the *Freedman* case, as set out on page 59:

> "Therefore, the procedure must also assure a prompt final judicial decision to minimize the deterent effect of an interim and possibly erroneous denial of a license."

Neither Texas statutes nor decisions of its appellate courts assures a prompt, final judicial decision. Judge

Hughes' opinion on the first ordinance is still correct.[6] There is no provision in the Texas statutes for prompt judicial review in the trial and appellate courts, and experience shows that the risk of delay is built into the Texas procedure. The Texas judicial system does not assure procedural safeguards that satisfy the requirements of *Freedman.*

II.

Ordinance 11284 Prohibits the Exhibition of Motion Pictures on Standards that are Vague and Ambiguous.

Ordinance 11284 has the following relevant provisions:

"Section 46A-1. Definition of Terms:

* * *

"(d) 'Young person' means any person who has not attained his sixteenth birthday.

* * *

"(f) 'Not suitable for young persons' means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests.

"A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is the substantial probability that it will

[6] *Interstate Circuit, Inc. v. City of Dallas* 247 F. Supp. 906, 911 (N.D. Tex. 1965). Conclusion of Law No. XIII.

create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest" of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

This provision for classification by the Dallas Board does not contain the word "obscene". Ordinance 10963 contained the identical language with the identical numbers, with the exception that "young persons" was defined as being anyone who had not attained his eighteenth birthday. *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906, 913 (N.D. Tex. 1965). Although this ordinance was declared unconstitutional because it did not provide for a system of judicial review, Conclusions of Law IX and X introduced the new term "when viewed by an audience of young persons".[7]

[7] Conclusions of Law IX and X on Page 910 read as follows:
"IX. The States' authority over chidren's activities is broader than over like activities of adults, and the fact that certain films are not obscene under the Supreme Court definition in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L. Ed. 2d 1498, and affirmed in Jacobellis v. State of Ohio, 378 U. S. 184, 84 S. Ct. 1676, does not necessarily render them not obscene when viewed by an audience of young persons, as defined in Section 46A-1 of the Ordinance, so as to protect them under the First Amendment to the Federal Constitution. Jacobellis v. State of Ohio, 378 U. S. at 195, 84 S. Ct. 1676; Prince v. Commonwealth of Massachusetts, 321 U. S. 158, 168, 64 S. Ct. 438, 88 L. Ed. 645 (1944); State v. Settle, supra; In re Louisiana News Co. v. Dayries, supra.
(Continued on next page)

The City did not change the definition "not suitable for young persons" when it passed Ordinance 11284. In the second opinion the ordinance was sustained by a similar construction and use of the term "obscene when viewed by an audience of young persons". See *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp, 19, 24 (N.D. Tex. 1965). Conclusions of Law IX through XI.

The opinion of the Court of Civil Appeals found no infirmity in the ordinance because the terms were too broad, uncertain, or indefinite.

The opinion of Judge Bateman, in which Judge Dixon concurred, totally supported the ordinance without regard to obscenity tests. It provided:

> "It is my firm opinion that the constitutional guaranties of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as 'not suitable for young persons' is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States Supreme

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(Continued from page 22)

See Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 85-88 (1960); Fagan, Obscenity Control and Minors—The Case for a Separate Standard, 10 Catholic Lawyer 270 (1960); Note, "For Adults Only": The Constitutionality of Governmental Film Censorship by Age Classification, 69 Yale L. J. 141 (1959)."

"X. Films which to an audience of young persons are obscene when presented in a salacious manner are not protected by the First Amendment to the Constitution. The itemization of films in the Ordinance involved herein, set out under the definition of 'Not suitable for young persons' contained in Section 46A-1(f) (1) and (2) should be interpreted to include only those, which to an audience of young people as defined in the Ordinance, are obscene when presented in a salacious manner. When so interpreted, such films are not protected by the First Amendment to the Constitution. See citations under IX."

> Court intended, in Near v. State of Minnesota, 283 U.S. 697, 716 or in any other case, to make such a stringent limitation on the powers of a state or a city in this field" R. 174.

This analysis of the opinions construing Section 46A-7(f) leads to the conclusion that the City would not accept the restricted term, "obscene for young persons", which was developed by Judge Hughes, and that the Texas courts sustained the standard of the ordinance rather than using the new concept of "obscene for young persons".

Since the City and the opinion in the present case hold firm to the terms of "not suitable for young persons" set forth in the ordinance, it is proper to consider whether the ordinance itself is a legal standard for censoring motion pictures for any age group.

Various terms or standards have been classified as too vague or indefinite for use in a censorship ordinance. These include "Sacrilegious" *(Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 494 (1952)); "of such character as to be prejudicial to the best interest of the people of said City" *(Gelling v. Texas,* 343 U.S. 960 (1952)); "immoral and harmful" *(Superior Films, Inc. v. Department of Education,* 159 Ohio St. 315, 112 N.E. 2d 311 (1953), reversed, 346 U.S. 587 (1954)); "Obscene, indecent, immoral, inhuman, sacrilegious" or "would tend to corrupt morals" *(Kingley International Pictures Corp. v. Regents,* 360 U.S. 684 (1959)). A recent compilation of these cases and others is found in Krattenmaker's *Exclusion of Children from Violent Movies,* 67 Columbia Law Review 1149, 1166 (1967).

Roth v. United States, 354 U.S. 476 (1957) held that obscenity is not within the area of constitutionally protected speech or press. The famous *Roth* definition of "obscenity", "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests" has been clarified over the years. It was restated in *A Book, Etc. v. Attorney General of Commonwealth of Massachusetts*, 383 U.S. 413, 418 (1966) where it is stated:

> "Under this definition, as elaborated in subsequent cases, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to prurient interests in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The last sentence of the ordinance section defining "not suitable for young persons" is directly in the teeth of *Jacobellis v. State of Ohio, supra.* The language of the ordinance is:

> "In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and should determine whether its harmful effects outweigh artistic or educational value such film may have for young persons."

Jacobellis v. State of Ohio, 378 U.S. 184, 191 (1964), stated:

> "It follows that material dealing with sex in a manner that advocates ideas, Kingsley Int'l Pictrues Corp. v. Regents, 360 U. S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d

> 1512, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Neither may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. * * *"

The rule against "weighing" was reaffirmed in *A Book, Etc. v. Attorney General of Commonwealth of Massachusetts*, 383 U.S. 413, 419 (1966), where the Court, speaking to this subject, said:

> "The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient apeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.'

The opinion by Judge Dixon states:

> "We hold that '*Viva Maria*' has only a minimum of social value, if any at all, as to children under the age of sixteen years. And since it is permitted to be exhibited subject only to limited regulation, it is not constitutionally protected from the terms of the Ordinance which the city seeks to apply or from the terms of the temporary injunction granted by the trial court." R. 171.

It is submitted that both the Board and the Court followed the terms of the ordinance in weighing "harmful effects" against artistic or educational values.[8]

Three sub-questions remain:

(1) Does the First Amendment permit a different standard of censorship for motion pictures shown to children?

(2) Are children a clearly defined deviant sexual group that will be used as a basis for permitting a system of censorship with standards different from that used for an ordinary adult person?

(3) Does the term "young persons" have a sufficiently definite meaning that can be used as the basis for allowing a system of censorship to exist that is different from that which is accorded to material shown to an adult citizen?

Turning to the first of these questions, it must be admitted that prior opinions of this Court indicate that a different standard may be permitted. *Butler v. State of Michigan*, 352 U.S. 380 (1957), presented a case where a conviction was obtained under a general statute which made an offense the dissemination of material that was obscene or otherwise objectionable. The Court was asked to sustain the conviction on the ground that such a law was necessary to protect children. There was a separate statute designed to prohibit the distribution of obscene matters tending to the

[8] Mr. John Gilliland, a member of the Board, was called as a witness, and on cross-examination, admitted that the picture had some artistic value. R. 67. The Reverend James Robert Maceo, a member of the Board was called as a witness, and admitted on cross-examination, that the picture was generally a comedy. R. 91.

corruption of the morals of youth. The conviction was not under that statute. This case was reversed with an appropriate notation that it would reduce the adult population of Michigan to reading only that which is fit for children.

In 1964, that case was cited in *Jacobellis v. State of Ohio*, 378 U.S. 184, 195 (1964), the exact language from the opinion being:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children.' Butler v. Michigan, 352 U. S. 380, 383, 77 S. Ct. 524, 526. State and local authorities might well consider whether their objectives in this area woud be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution."

It is respectfully pointed out that this language was not necessary for the *Jacobellis* decision, and, therefore, it is a subject which is still open for review.

Also, see *Redrup v. State of New York*, 386 U.S. 767 (1967).

Three cases relating to obscenity were decided in 1966. This trilogy, *Ginzburg v. United States*, 383 U.S. 463, *Mishkin v. State of New York*, 383 U.S. 502, and *A Book, Etc. v. Attorney General of the Commonwealth of Massachusetts*,

383 U.S. 413, gave further explanation of the law on obscenity cases. *Mishkin v. State of New York* sustained the conviction for disseminating literature directed to deviant sexual groups. After rejecting an argument based upon the absolute standard of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962) the opinion states on page 508:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in *Roth*, 354 U.S. at 489-490, 77 S. Ct., at 1311, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, Regina v. Hicklin, [1868] L. R. 3 Q. B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons,[8] it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test."
>
> "[8] See generally, 1 American Handbook of Psychiatry, 593-604 (Arieti ed. 1959), for a description of the pertinent types of deviant sexual groups."

On page 593 of Arieti, *Handbook of Psychiatry*, to which reference was made, the major sexual perversions are listed. They are homosexuality, pedophilia, fetishism, transvestitism, exhibitionism, vouyerism, sadomasochism, zoophilia, coprophilia, and necrophilia. These topics are discussed in the text that follows, and in addition, there are headings on

"Lust Murder" and "Group Perversion" in the text discussion which follows. "Children" is not a class listed.

Turning now to our second question, we must answer that children are not a clearly defined deviant sexual group. It is important that this proposition be stated because it avoids a major confusion which results if the language of *Butler* and *Jacobellis* regarding children is allowed to gain support from a doctrine of obscenity which was announced to prohibit a pandering to clearly defined deviant sexual groups.

The third sub-question should be answered in the negative because the term "young persons" does not have a sufficiently definite meaning to permit a system of censorship for material shown to young persons when this same material can be distributed to those who are not young persons.

In the present ordinance, the term "young person" is defined as one who has not attained his sixteenth birthday. R. 121. But, in Ordinance 10963, this same term was defined as one who has not attained his eighteenth birthday. *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906, 913 (N.D. Tex. 1965).[9]

[9] The preamble of Ordinance 10963, found on page 912 of the opinion, contains the recitation that the City Council had found there was a serious increase in crime, delinquency, and sexual promiscuity on the part of young persons of school age within the City; that such increase is the result of various factors including the type of commercial entertainment available to such young persons; that among entertainment media, motion picture films possess a greater capacity for good and for evil among young persons of school age than other modes of expression, and are therefore affected with the public interest, and that some of the films currently being shown and accessible to viewing by such young persons though not obscene to such an extent as to justify complete suppression, nevertheless have a tendency to incite or encourage criminal, delinquent and sexual promiscuous behaviour on the part of such young persons, and that an urgent public necessity exists to protect such young persons from the exhibition of such films.

For a comparison of the preamble in the present ordinance which does not recite a "juvenile crime wave", see R. 120.

It would seem that there must be valid reason for reducing the age limit from eighteen, as was found in the unconstitutional Ordinance 10963, to sixteen, as is in the present Ordinance 11284.

Since it is obvious that, considering all persons under eighteen years of age, the more senior part of this group would be more likely to be guilty of crime, delinquency, and sexual promiscuity, there must be some reason why the age limit was dropped. Was it because there was no "crime wave"? Was it because the first ordinance was in error, and children over sixteen, like those over eighteen, were not affected by the material which could be safely shown to an adult audience? Was it because the City was determined to have a classification ordinance to censor something, and having failed on the first by virtue of judicial review, it felt that it would be easier to sustain an ordinance censoring for a younger group, with the provision that pledged the cooperation of the City in trying to get the Texas courts to hear cases?

These unanswered questions may help to demonstrate the difficulty in finding a clear definition of "young persons".[10]

Returning then to the main question under discussion here, it is submitted that the ordinance introduces the term "young

[10] There are two cases where the term "young person" has been given a definition. In the first of these, *In re Stoner*, 74 Ind. App. 327, 128 N.E. 938 (1903), there was a statute which defined young persons as those between fourteen and eighteen years of age. The second case, *Keeney v. McVoy*, 206 Mo. 42, 103 S.W. 946, 954 (1907), quotes a dictionary definition of a child and one of the terms to which it is equated is "one of tender years, a young person, a youth".

person" and gives it a statutory definition as one who has not reached his sixteenth birthday.

If the definition of "young persons" is to rest solely on the caprice of the Dallas City Council, the constitutional privilege of free communication is eroded. For each municipality to have a system of partial censorship based upon its own definition of "young person" invites a return to the confusion that existed when the "contemporary community standard" was defined by each local government. At the moment, Dallas has set the age at under sixteen, but the sattelite cities could set it at sixteen through twenty-one, or older. Of course, if the term has no meaning except that which the city council gives to it, at any meeting it can raise the age to eighteen, twenty-one, or older.

It should not be necessary to re-define obscenity either directly or by implication in order to have different standards for varying age groups. To sunder the term "obscenity" in this fashion is unrealistic, and puts an overwhelming burden on every judicial system which must give a prompt judicial review to the classification of pictures under the different standards of each ordinance.

The terms of 46-A1(f), used to define "not suitable for young persons", are each unconstitutional under cases already decided. Using them to censor material shown to a vague and uncertain class does not give these terms a better standing. The use of "young persons" to define the class subject to censorship only aggravates the problems of uncertainty.

III.

The Dallas Motion Picture Classification Board and the Lower Courts Applied Unconstitutional Standards in Classifying "Viva Maria" as "Not Suitable for Young Persons".

A Conclusion That the Picture Was Sacrilegious Was Used as a Basis for the Classification of "Not Suitable For Young Persons".

Viva Maria would be classed as a simple comedy by anyone who has seen the picture. It was classified as "unsuitable (sic) for young persons" by action of the Classification Board. R. 137-138. These minutes do not reflect any reason for the classification.

Mr. John Gilliland, a member of the Board, was called as a witness. R. 44. After reciting that the minutes did not state the reason for the classification, he proceeded into a colloquy where the following was asked, and the answers given:

> "Q. As a matter of fact, back to your own opinion from viewing that picture, you do not consider it to encourage or incite crime or delinquency on the part of young persons, do you?
>
> "A. Well, I think the ordinance talks about the judgment of the board, if the movie tends to do these things. The board has to rule on this basis. Now, if you are asking me personally,—
>
> "Q. Yes, sir.
>
> "A. —I think, as far as the violence portion goes, when the clergy got tangled up in it really was the only

thing, as far as violence goes. That was not very good as far as I was concerned because it really in a sense okayed violence because the clergy really was the perpetrators of the violence. In that sense I think it falls under that portion. At least that was my opinion.

"Q. Wouldn't it be fair to say that that portion was considered by you to be sacrilegious?

"A. I don't think of it in that sense myself, but I am sure that entered into it." R. 64.

It is noted that the witness developed the concept of impropriety by the clergy in participating in violence, and he further stated that the question of sacrilege entered into the decision of the board. He went on to explain that the picture had a lot of spoofing or poking of fun as a part of the plot.

The Geographic Area of the City of Dallas was used to determine the Contemporary Community Standard.

The Reverend James Robert Maceo, a member of the Classification Board, was called as a witness. R. 74. On cross-examination he was asked the question regarding the term "community". The following colloquy took place:

Q. And what do you mean "our community"?

"A. The City of Dallas.

"Q. And when you and the other board members were discussing *'Viva Maria!'* and speaking in terms of the contemporary standards of the community, you and the board members were speaking of the Dallas community, were you not?

"A. I was, and as far as our discusion goes, it was in terms of the teenagers or young people we know.

"Q. And if I were to ask you what the community was that you were considering in the context of the ordinance, you would say you were considering the Dallas community?

"A. That is my experience.

"Q. And that is the only community you were considering?

"A. Yes." R. 93-94.

This testimony clearly shows that the witness limited his consideration of a contemporary community standard to the City of Dallas.

This violates the general test of obscenity, whether for adults or young people, which was announced first in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962) and which was reiterated in *Jacobellis v. State of Ohio*, 378 U.S. 184 (1964). It also violated a Texas law on the subject of obscenity, Article 527 of the Penal Code (Appendix B) which defined a contemporary community standard as a geographic area not less than the State of Texas. This amendment, passed in 1961, predated the *Manual Enterprises, Inc. v. Day* rule by one year.

The Trial Judge Used Erroneous Standards in Judging the Picture on a Few Isolated Scenes

At the conclusion of the trial, the court stated:

"Oh, I realize you gentlemen might be right. There are two or three features in this picture that look to me would be unsuitable to young people. Actually, they have tried to track that Friedman (sic) case, looks like, in this ordinance, and if any ordinance can be passed,

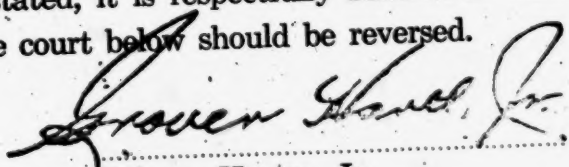
why, it loks like they have taken every ground to pass one if one can be valid, that it, valid. So I enjoin the exhibitors, its agents, servants, attorneys and employees from exhibiting it. * * *" R. 116.

This statement, made spontaneously by the court, shows the basis of the judgment at the trial level. It did not apply the "prurient interest", "patent offensiveness", and "no redeeming social value" tests of obscenity, whether for adults or young persons. As was stated directly, it was two or three features that the court thought would be unsuitable to young persons.

This is an improper test.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.



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PROOF OF SERVICE

I, Grover Hartt, Jr., one of the attorneys for Interstate Circuit, Inc., Appellant herein, and a member of the Bar of The Supreme Court of the United States, hereby certify that, on the 28th day of September, 1967, I served copies of the foregoing Brief of the Appellant Interstate Circuit, Inc. on the several parties hereto, as follows:

1. On Appellee City of Dallas, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. N. Alex Bickley, City Attorney, 301 Municipal Building, Dallas, attorney of record for the City of Dallas.

2. On Intervenor United Artists Corporation, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. Paul Carrington, 1900 Mercantile Dallas Building, attorney of record for United Artists Corporation.

Grover Hartt, Jr.

GROVER HARTT, JR.

3525 Southland Center,
Dallas, Texas 75201.

APPENDIX A

Chronology Table for Appendix

All dates are 1966

No.	*Date*	*Event*
1.	Jan. 24	Interstate's Application to Classify "Viva Maria" as "suitable for young persons".
2.	Jan. 25	Classification Board voted to screen picture.
3.	Feb. 9	Board classified picture "not suitable for young persons".
4.	Feb. 11	Exhibitor gave notice of non-acceptance.
5.	Feb. 14	City filed Plaintiff's Original Petition.
6.	Feb. 17	Interstate's answer filed.
7.	Feb. 17	Temporary Injunction hearing began.
8.	Feb. 17	"Viva Maria" opened at Esquire Theatre.
9.	Feb. 18	Temporary Injunction entered
10.	Feb. 21	Motion to Send Original Exhibits
11.	Feb. 21	Interstate's Request of Record and Statement of Facts.
12.	Feb. 25	Transcript filed.
13.	Mar. 19	Interstate's brief filed in Court of Civil Appeals.
14.	Mar. 24	City's brief filed.
15.	Mar. 24	Motion to Advance case and to exhibit picture filed.

Chronology Table for Appendix

All dates are 1966

No.	Date	Event
16.	Mar. 24	Motion to Advance granted.
17.	Mar. 24	Order to Show Film
18.	April 5	Judgment of the Court of Civil Appeals
19.	April 5	Opinion of the Court of Civil Appeals
20.	April 6	Interstate's Motion for Rehearing filed
21.	April 7	City's Reply
22.	April 20	United Artists Motion for Rehearing
23.	April 22	City's Reply
24.	April 25	Appellants' Motion for Rehearing Overruled
25.	May 19	Interstate's Petition for Writ of Error
26.	May 23	Stipulations between Interstate, United Artists, and City agreeing that City could mail reply to Petition for Writ of Error by May 31. This was done to relieve a conflict arising by virtue of a companion case between the same parties set before the United States Court of Appeals on May 23.
27.	May 23	Interstate's Application for Writ of Error filed in Supreme Court of Texas
28.	May 31	City's Reply mailed

Chronology Table for Appendix

All dates are 1966

No.	*Date*	*Event*
29.	June 6	Joint Motion to Advance filed.
30.	July 27	Texas Supreme Court refuses Writ of Error, n.r.e.
31.	Aug. 10	Interstate's Motion for Rehearing filed
32.	Aug. 18	City's Reply
33.	Sept. 30	Interstate's Supplemental Motion for Rehearing
34.	Oct. 4	City's Reply
35.	Oct. 19	Texas Supreme Court overruled Motion for Rehearing
36.	Jan. 11, 1967	Notice of Appeal to Supreme Court of United States

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The above Chronology Table has been prepared by appellant Interstate and approved by the City of Dallas, and is tendered here to assist in clarifying the time sequence involved in the proceeding.

APPENDIX B

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged,

except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Texas Constitution

Article I

Sec. 8. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Texas Penal Code

Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions

Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement; circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appears to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Section 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion picture produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Section 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out, and enforce the provisions of this Act. As amended Acts 1955, 54th Leg., p. 386, ch. 107, § 1; Acts 1957, 55th Leg., p. 425, ch. 203, § 1; Acts 1961, 57th Leg., p. 1041, ch. 461, § 1.

Dallas City Ordinance No. 11,284

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by adding thereto a new chapter known as Chapter 46A; Providing for the establishment of a Motion Picture Classification Board; Outlining classification procedures; Defining Offenses relating to the exhibition of films classified "Not Suitable for Young Persons"; Providing for the issuance, revocation and suspension of

licenses; Providing for judicial review; Defining public nuisances; Providing for injunctive relief; Providing for an exception to State law; providing for a severability clause; Providing for a Penalty; Providing for the repeal of Ordinance No. 10963 enacted by the City Council on April 5, 1965, and enacting this ordinance in lieu thereof; and Declaring an Emergency.

WHEREAS, the City Council after investigation on the part of the members of said Council and the hearing of evidence and testimony at a public hearing called for that purpose, if of the opinion and finds that certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; and

WHEREAS, the City Council is of the opinion that legislative action should be taken by this Council for the purpose of classifying the movies to which said young persons of school age are admitted without proper supervision; and

WHEREAS, the City Council is of the opinion and finds that a great portion of said movies are available for screening and for showing more than thirty days prior to their initial exhibition and that the benefits to the public will far exceed the burden placed upon the motion picture industry by having said movies screened and classified; and

WHEREAS, the City Council is of the opinion and finds that motion picture films possess a greater capacity for good and for evil among young persons of school age than most

other modes of expression and are, therefore, affected with a public interest; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and is hereby amended by adding thereto a new chapter known as Chapter 46A, consisting of Section 46A-1 through 46A-11 inclusive, which shall read as follows:

"CHAPTER 46A"

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms

§ 46A-2 Establishment of Classification Board

§ 46A-3 Classification Procedure

§ 46A-4 Offenses

§ 46A-5 License

§ 46A-6 Revocation or suspension of license

§ 46A-7 Judicial Review

§ 46A-8 Public Nuisances

§ 46A-9 Injunctions

§ 46A-10 Exception to State Law

§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relation in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexular promiscuity on the part of young persons or to appeal to their pruient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of

young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the films as a whole, rather than isolated portions, and shall determine whether its harmful effects outweight artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more

of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the

Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified as 'not suitable for young persons'.

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibitio nof a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified as 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License:*

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license:*

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file and order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period

not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's appli-

cation for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said motion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its ap-

plication for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exemption to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable

as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

SUPREME COURT, U. S.

NOV 13 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 56

INTERSTATE CIRCUIT, INC.,

Appellant,

v.

CITY OF DALLAS,

Appellee.

No. 64

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I.

SUMMARY OF ARGUMENT

The City Council of the City of Dallas passed Ordinance No. 11284 on November 22, 1965. This ordinance was applied to the motion picture "Viva Maria" sought to be shown in the City of Dallas by Interstate Circuit, Inc. The Dallas Motion Picture Classification Board under the Ordinance classified it as "not suitable for young persons." The

exhibitor filed notice of non-acceptance. The Board then proceeded to seek an injunction in the trial court, including a finding by the Texas District Court that the motion picture was in fact "not suitable for young persons."

The City of Dallas differs with the Appellants in this case in that we believe that the test as set forth in the *Freedman v. Maryland case*, 380 U.S. 51 (1965) requires a prompt judicial determination in an adversary proceeding before the trial court of proper jurisdiction, but does not require a prompt judicial decision at all levels of appeal or in all of the Appellate Courts. The ordinance makes proper provision for this hearing, and also obligates the Board to waive time limits in seeking a speedy appeal.

The ordinance requires a notice of non-acceptance by the exhibitor before suit is instituted against it. The City contends that this is not unconstitutional.

In defining the phrase "not suitable for young persons" as used in the ordinance, precision is not required beyond reasonable ascertainable standards. The ordinance provides this.

We believe the pronouncements of this Court under the First Amendment to the Constitution, make provision for variable standards of obscenity. In addition we interpret them to mean that there can be a restraint by classification insofar as young persons are concerned short of complete obscenity.

This ordinance as passed by the City of Dallas should not be treated the same as one which completely prohibits the

dissemination of material because it allows presentation of such material to young persons when accompanied by a parent, guardian, husband or wife.

Regardless of whether or not this ordinance was properly applied to the film "Viva Maria", the ordinance itself still sets forth the constitutional standards as enunciated by this Court. We maintain that it was properly applied to this film.

When the interests of the state are properly balanced against the interest of the individual whose sole purpose is to profit from the dissemination of material to young persons, the ordinance should be approved as constitutional.

The Appellee in this brief incorporated its arguments in opposition to that of the Appellant Interstate Circuit, Inc., and of the Appellant United Artists Corporation.

II.

ARGUMENT

1.

ORDINANCE NO. 11284 CONTAINS PROCEDURAL SAFEGUARDS NECESSARY FOR A MOTION PICTURE CLASSIFICATION SYSTEM TO AVOID CONSTITUTIONAL INFIRMITY IN ACCORDANCE WITH THE DECISIONS OF THIS COURT.

(a) Ordinance No. 11284 does grant a prompt judicial decision as required by the Constitution.

This portion is in response to Argument I, pages 11-21 of Appellant Interstate Circuit's brief.

This Court in the case of *Freedman v. State of Maryland, supra*, pointed the way to the drafting of legislation providing for prior restraint of freedom of speech under the First Amendment. At pages 58-59, the Court said:

> "Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. * * * To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. * * *"

The ordinance in question was drafted pursuant to the requirements set out in the *Freedman* case. It has been reviewed by the United States Court of Appeals for the Fifth Circuit in the case of *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590 (1966) and by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in *Interstate Circuit, Inc. v. City of Dallas*, 402 S.W. 2d 770 (1966). Both Courts held that the provisions of Ordinance No. 11284 authorizing the Dallas Motion Picture Classification Board to classify a motion picture as being "not suitable for young

persons", as well as the provisions for a prompt final judicial review, satisfied constitutional requirements. Each Court relied on the decisions of this Court.

Three days after the exhibitor gave notice of non-acceptance of the classification "not suitable for young persons," this Appellee filed suit in the District Court of Dallas County, Texas. The suit was filed on February 14, 1966, for a temporary and permanent injunction in accordance with the provisions of the ordinance in question, seeking to prohibit Appellant:

> (1) From exhibiting the film "Viva Maria" without advertising the film as "not suitable for young persons," and
>
> (2) From violating Ordinance No. 11284, as amended, by exhibiting any film contrary to the provisions of the ordinance.

On February 16, 1966, United Artists Corporation, also an Appellant herein, intervened in opposition to the City, asserting that it is a distributor of motion pictures and is the exclusive owner of distribution rights of the film "Viva Maria."

On February 18, 1966, following a hearing begun the day before, the Court granted the City's prayer for a temporary injunction. The City offered to try the case on its merits at the same time, that is, try the whole case on February 18, 1966, including the application for permanent injunction. This offer was declined by Appellants; and on March 24, 1966, the Motion to Advance was granted and the case was

submitted to the Court of Civil Appeals on March 28, 1966, and decided on April 5, 1966.

It appears that the real difference between the parties in this case is whether or not this Court, in the *Freedman* case, in talking about the judicial determination to which the exhibitor is entitled, means a prompt adversary proceeding before a court of competent jurisdiction in the first instance, such as the trial court; or whether it means that all of the appellate procedures must be exhausted, *including the appeal to this Court.* We are of the opinion that this Court has said that a prompt judicial review is afforded to the exhibitor and the producer when they have an opportunity to be heard at an adversary proceeding in a de novo trial before a trial court of competent jurisdiction. In this case, the trial court after a hearing, issued its order within *seven days* after the exhibitor gave his notice of non-acceptance of the classification by the Board. To require more than this is beyond the bounds of reason.

There are several reasons why we adopt this interpretation of the Court's opinion in the *Freedman* case. The Court itself indicated this on page 58 when it said:

> "* * * The teaching of our cases is that, because only a judicial determination in an adversay proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. * * *"

The Court also stated that a model which would be followed is set out in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). The procedure set out in that case is Section

22-a-2 of the New York Code of Criminal Procedure. This provides:

> "2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial." (page 438)

There is no provision in the New York Code concerning any further appeal of the adversary proceeding before a Court. This Court upheld the New York provision when it was attacked:

> "* * * Authorization of an injunction pendente lite, as part of this scheme, during the period within which the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding for which '[a]dequate notice, judicial hearing, [and] fair determination' are assured, 208 Misc 150, 164, 142 NYS 2d 735, 747, is a safeguard against frustration of the public interest in effectuating judicial condemnation of obscene matter. * * *" (page 440)

This procedure was upheld as being due process of law, yet nothing was said in the whole procedure about how long it would take to appeal the case through all of the appellate procedures and arrive at a final incontestable decision.

Following the decision in the *Freedman* case, the general assembly of the State of Maryland amended the Maryland statute, and this statute as amended provided for judicial review. In general it provided that the Board, if it disapproved a film, should within three days apply to the Circuit Court seeking a judicial determination as to whether such

film was obscene. The Circuit Court was required, within five days after the filing of said application, to conduct a hearing, view the film, and within two days thereafter enter its decree. The statute went further to say:

> "* * * If the decree or order disapproves said film as being in violation of the provisions of Section 6 hereof, then the person presenting such film for licensing may appeal said determination to the Court of Appeals of Maryland, in accordance with the Maryland Rules of Procedure, and said Court shall advance such case on its hearing calendar to the earliest practicable date; * * *" (Maryland Anno. Code Art. 66A)

No mention is made of the time that an appeal would actually take. No set procedure guarantees to the exhibitor a final decision by the Appellate Court within any period of time.

The new statute was presented to the Maryland Court of Appeals in the case of *Trans-Lux v. Maryland*, 213 A. 2d 235, (1965) and that Court held that the Maryland statutory provision for pre-showing motion picture censorship was constitutional on its face. Additionally, *The United States Law Week* (10/19/65) 34 LW at 2205, reported an excellent analysis of this question in the light of the *Freedman* and *Trans-Lux cases*, which reads in part as follows:

> "The Freedman case does not proscribe all pre-showing censorship but requires that under such a statute the exhibitor be assured that the censor will within a brief period, either issue a license or go to court to restrain showing of the film. Furthermore, Freedman requires that any restraint imposed in advance of a final determination on the merits be limited to preserva-

tion of the status quo for the shortest fixed period compatible with sound judicial resolution.

"The present Maryland statutory plan for pre-showing motion picture censorship meets these constitutional requirements as laid down in Freedman."

Apparently the other Federal Courts are taking the same view of the prompt judicial determination requirement that is being taken by this Appellee; that is, there must be a prompt judicial determination in an adversary proceeding before a court of competent jurisdiction. This does not require any unusual appellate proceedings, although Ordinance No. 11284 does assure to the exhibitor that everything possible will be done to grant it a speedy appellate procedure as well.*

* A summary of the provisions of Ordinance No. 11284, which are material to a prompt judicial review, and as referred to by the Texas Court of Civil Appeals,(402 S.W. 2d 770, 772) are as follows:

Sec. 46A-7. *Judicial Review:*

(a) Within two days after filing of the classification by the Board, any exhibitor may file a notice of nonacceptance. If the Board desires to contest the exhibitor's nonacceptance, it shall:

(1) Make application in court within three days for a temporary and permanent injunction.

(2) Have application for temporary injunction set for hearing within five days. If the exhibitor waives notice pursuant to rules of procedure and requests a hearing on the merits on the day set for the hearing on the temporary injunction, the Board shall be required to waive its application for temporary injunction and shall join in such request.

(3) In the event the exhibitor appeals the City shall reply to appellant's brief within five days.

(4) Same in substance as Paragraph (3) if application for writ is made to Supreme Court of Texas by exhibitor.

(5) If trial court denies the Board's application for injunction and Board appeals, Board shall be required to waive all periods of time allowed it by Texas Rules of Civil Procedure, file motion for new trial only if required and then within two days; shall not amend its motion

The United States Court of Appeals for the Fourth Circuit in the case of *United States v. 56 Cartons Containing 19,500 Copies of Magazines*, 373 F. 2d 635, (1967) gave its analysis of the requirement of a prompt judicial decision in the following words at page 637:

> "Viewed in its entirety, it cannot be said that there was any unreasonable delay. From March 4, 1966, when the cartons were entered, until April 5, 1966, when the District Court filed its formal opinion, or until April 14, 1966, when a formal order in conformity with the opinion was filed, the administrative procedures and the judicial proceedings, together, required little more than a month for a final judicial determination in the District Court of the question of obscenity, including the resolution of the related constitutional questions.
>
> "The answer could not have been had in so short a time had not the matter received the prompt attention of the District Court and had it not given the case great preferential treatment through the scheduling and conduct of the hearing to the filing of an opinion and the entry of the formal judgment."

The time was even greater in the case of *United States v. One Carton Positive Motion Picture Film*, 367 F. 2d 889,

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and shall obtain a hearing within five days. Board shall perfect appeal to Court of Civil Appeals including filing of Transcript, Statement of Facts and brief within ten days and shall then file a motion requesting the Court of Civil Appeals to advance the submission of the appeal.

(6) If the Court of Civil Appeals reverses the trial court's injunction order, or if the court refuses to reverse the order, provisions are made similar to those outlined in Paragraph (5) above for the hearing of and decision by the Supreme Court of Texas.

(b) The Board must secure a favorable judgment from the trial court within ten days or let the film be shown without restriction.

(1967) by the Second Circuit Court of Appeals. The action was instituted on April 22nd and ended on October 21st. The opinion of the Court was issued on November 17th and of this the Court had to say:

> "* * * The judicial action was anything but protracted * * *" (page 904)

While these cases deal with a Federal Statute and the customs control, the same rules apply. There is no reason to assume that one rule would be applicable to Federal procedures and Federal Courts and another rule applicable to State procedures and State Courts. *United States v. One Carton Positive Motion Picture Film*, 247 F. Supp. 450 (1965).

(b) The Dallas Ordinance is not void because it requires a notice of non-acceptance by the exhibitor prior to the institution of suit for a judicial determination.

This is in response to the argument under III A. of Appellant United Artists' brief, pages 51-58. We agree with the Appellant that—

> "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Freedman v. Maryland, supra.*

We do not agree that the requirement of the Dallas Ordinance of the filing of a "notice of non-acceptance" is unconstitutional. Section 46A-7(a). (R. 128)

The Appellant United Artists Corporation further argues that the City must not only assume the burden of proof, but must file a lawsuit on every film classified "not suitable for young persons", whether there is any disagreement with the exhibitor or not. (Brief p. 55) As authority for this statement it quoted from the *Freedman* case the part which refers to the burden being placed upon the distributor. The only prerequisite required under Ordinance No. 11284 is that the distributor indicate its dissatisfaction with the Board's classification. This notice entails no burden of proof. If a "judicial determination" is desired, a simple notice of disagreement commands the City of Dallas to provide it. It is mandatory that the City of Dallas obtain a speedy judicial determination to prove that the motion picture in question is "not suitable for young persons." The burden of proof is squarely on the City. To require the City to obtain a judicial determination in an adversary proceeding in which the exhibitor did not desire to be an adversary, is the requirement of a vain thing. The Courts have not been prone to do this.

This Appellant cites as authority the case of *Lamont v. Postmaster General*, 381 U.S. 301 (1965) which involved the constitutionality of a Federal statute. That statute required the addressee of mail to request the delivery of certain types of mail by returning an attached reply card. At the same time, the Court pointed out that it would have a deterrent effect to those in sensitive positions. The mail being delivered was not even of obscene or prohibited ma-

terial and would be immediately forwarded upon return of the reply card. The condition imposed in that case is far different from the one in the case at bar because the notice in the Dallas ordinance is a procedure which indicates that a judicial determination is desired by the exhibitor. It is nothing more and nothing less.

The Appellant United Artists Corporation further cites the case of *Garrity v. New Jersey*, 385 U.S. 493 (1967) for the proposition that the Government may not condition its exercise of a constitutional right upon "the exaction of a price." It is hardly proper to refer to a case like that which imposes the loss of a job upon an officer if he refused to answer a question concerning his own guilt to the one like the case at bar and the requirement of the Dallas ordinance. We might point out that there was a very strong dissent in the case.

On page 57 of its brief, Appellant United Artists states that if Interstate had inadvertently neglected to file a notice of non-acceptance of the Board's classification, the showing of "Viva Maria" would have been finally restricted to "not suitable for young persons." They failed to quote to the Court that section of Ordinance No. 11284 which makes provision for a rehearing or a subsequent application:

"Section 46A-3. Classification Procedure:

* * * * *

"(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such

> application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any [fol. 161] proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification." (R. 125)

If the argument of Appellants is correct, they are simply saying that as a matter of constitutional law, every film that is classified "not suitable for young persons" must be adjudicated to be "not suitable for young persons" by a court of competent jurisdiction. This means that even in the numerous cases that the exhibitor has itself classified a film as "not suitable for young persons", there is a duty upon the Board to take the case to court,—this, in spite of the fact that the exhibitor will not even show up in court, will not be present, or if present, will tell the court, "We agree that it should be so classified." The Constitution of the United States cannot be, and is not, so inflexible as to require such a frivolous and useless procedure.

The Fifth Circuit, United States Court of Appeals in *Interstate Circuit, Inc. v. City of Dallas, supra,* in its decision on this very same ordinance, outlines the steps that must be taken. It noted the exhibitors duty to file a notice of non-acceptance of the Board's classification. Following this the Court held:

> "It seems obvious that this procedure complies with the standards established in *Freedman,* with the only possible objection being the length of time necessary to get a final adjudication on the merits. * * *" (page 600)

This Court has not noted jurisdiction in the writ applied for from that case and that holding.

This Court held in *Times Film Corporation v. Chicago,* 365 U.S. 43, 46 (1961) that the Chicago ordinance requiring the submission of films prior to their public exhibition was not void for this reason. The ordinance required a far more onerous burden than the one provided for in the Dallas ordinance. Therefore, the provision for a judicial determination in Ordinance No. 11284 is in compliance with the interpretation of the Constitution by this Court.

2.

THE STANDARD FOR THE CLASSIFICATION OF MOTION PICTURES AS "NOT SUITABLE FOR YOUNG PERSONS" IN ORDINANCE NO. 11284 IS VALID AND SUFFICIENTLY DEFINITE UNDER THE CONSTITUTIONAL REQUIREMENTS.

Both of the Appellants have advanced the argument that Section 46A-1(f) of Ordinance No. 11284 is vague and in-

definite. This was the same argument that they made before the Texas Court of Civil Appeals in the case of *Interstate Circuit, Inc. v. City of Dallas, supra,* which overruled this argument. They also argued it before the United States Court of Appeals for the Fifth Circuit in *Interstate Circuit, Inc. v. City of Dallas, supra,* which the court overruled with modifications.

We do not have to depend upon the holding of either of these Courts for our standards but need only to look to those standards that have been enunciated by this Court.

This Court in the case of *United States v. Petrillo,* 332 U.S. 1 (1947) held:

> "* * * but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." (Pages 7-8)

The language there being discussed was the language of the statute which read, "Number of employees needed by such licensee", as it referred to a radio broadcaster in the broadcasting business.

The Dallas ordinance suffciently described the term "not suitable for young persons" to give adequate warning of the conduct proscribed and give a fair test for judge and jury. Many cases by this Court have indicated that a different standard can be applied to the young person than that applied to the adult.

In *Butler v. Michigan,* 352 U.S. 380 (1957) the statute made the distribution to the general public of publications

"tending to the corruption of the morals of youth" a misdemeanor. This Court suggested the probable validity of a statute properly drawn to protect children with restricting the First Amendment rights of adults.

The *Butler* case was followed in a few months by the test and definition of obscenity in *Roth v. United States*, 354 U.S. 476 (1957).

Then in *Jacobellis v. State of Ohio*, 378 U.S. 184, 195 (1964), Justice Brennan in applying the *Roth* test to the "society at large", directed local authorities to aim their laws specifically "at preventing distribution of objectionable material to children rather than at totally prohibiting its dissemination." Note was made of *State v. Settle*, 90 R.I. 195, 156 A. 2d 921 (1959) which turned on a restriction upon the public at large and not on children only. Justice Goldberg joined Justice Brennan. Chief Justice Warren, Justice Clark and Justice Harlan by their observations, would let the state protect children from material not obscene as to adults.

The Court then apparently put its final stamp of approval on variable obscenity in *Ginzburg v. United States*, 383 U.S. 463 (1966) when it rejected the proposition that obscenity is a matter inherent in the material published under all circumstances. This was followed by *Mishkin v. State of New York*, 383 U.S. 502 (1966), deviating from the test of the "average" person and considering the group at which the

material is aimed. In our case this is analogous to the young person to whom the film is exhibited.*

We urge the Court to keep in mind in its decision on this case, the fact that this ordinance is directed to the age-old concept that the parent should be responsible for and should direct the training of the young mind and of the young person. The ordinance provides that when accompanied by its parent, guardian, husband or wife, the child or young person may be admitted to the movie regardless of classification. Up to this time, all of the cases discussed have been concerned with those cases that deal with obscenity as such, and yet on behalf of the public interest and for the protection of the family life and of the training of the young mind, there is something less than obscenity which is a detriment to the community and to the people that live in it. It has been recognized in many other endeavors and this Court has recognized it insofar as the First Amendment freedoms are concerned.

It is not uncommon to find States prohibiting young persons from entering pool halls, from partaking of alcoholic beverages or from entering places where alcoholic beverages are sold. We do not allow the young person with the immature judgment to drive automobiles. They are prohibited from voting. In many States they cannot purchase rifles or other weapons. The statutes and the regulations are legion which make a distinction between the young person and the person with the adult judgment. Why should this come as such a shock when an ordinance attempts to pro-

* See also "For Adults Only"; the Constitutionality of Governmental Film Censorship by Age Classification, 69 Yale L.J. 141 (1959)

tect the young and immature mind from filth and salacious material found in movies that are exhibited to the adult audience?

Not only did this Court recognize that interest in *Jacobellis v. Ohio, supra*, but it directed state and local authorities to a consideration of that interest and suggested that their laws be aimed specifically to objectionable material being disseminated to children, rather than at a total prohibition of its dissemination. Certainly, the Dallas ordinance has attempted to do this in that it has not totally prohibited the dissemination of any material, including movies, to any person, whether adults or children.

Similarly, in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944), the Court construed a statute of the State of Massachusetts which prohibited any boys under 12 years and girls under 18 years from selling newspapers, periodicals, or other articles or merchandise, or to exercise any trade, in any street or public place. The statute was attacked on the ground that it violated the First Amendment to the Federal Constitution. In holding the statute valid, the Court pointed out that the State had an interest in the welfare of children, and that a family itself is not beyond regulation in the public interest against claim of religious liberty:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145, 25 L. ed. 244; Davis v. Beason, 133 U.S. 333, 33 L. ed. 637, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as

parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. People v. Pierson, 176 N.Y. 201, 68 N.E. 243, 63 L.R.A. 187, 98 Am. St. Rep. 666. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent; matters of conscience and religious conviction." (pages 166, 167)

The Court conceded that the legislation might be invalid had it been applied to the sale of such items by adults, but stated that:

"* * * the mere fact a state could not wholly prohibit this form of adult activity * * * does not mean it cannot do so for children. * * *

"The state's authority over children's activities is broader than over like actions of adults. * * * A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impending restraints and dangers, within a broad range of selection. * * *" (page 168)

This restriction upon the First Amendment freedom of religion insofar as it applies to children in the *Prince* case is the same as the classification of movies under the Dallas ordinance.

This same reasoning was followed in *Chemline, Inc. v. City of Grand Prairie*, 364 F. 2d 721 (1966) when an injunction was sought against an ordinance that made it unlawful to exhibit nude or semi-nude pictures on theatre screens within the view of public streets highways. Particular emphasis was put upon its effect upon children as such and a lot of consideration was given to the public interest to be protected as the Court discussed it in these words:

> "It seems to us that the City has followed the suggestion of the Supreme Court and has enacted an ordinance reasonably aimed at preventing the exhibition of objectionable pictures to children.
>
> If there be capacity for evil in a motion picture 'it may be relevant in determining the permissible scope of community control.' Joseph Burstyn, Inc. v. Wilson, 1952, 343 U.S. 495, 502, 72 S. Ct. 777, 780, 96 L. Ed. 1098. As said in American Communications Association, CIO v. Douds, supra, 339 U.S. at 397, 70 S. Ct. at 683: 'When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity.' See also Adams Newark Theater Co. v. City of Newark, 1957, 354 U.S. 931, 77 S. Ct. 1395, 1 L. Ed. 2d 1533; Breard v. City of Alexandria, 1951, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233; Feiner v. People of State of New York, 1951, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 267; Kovacs v. Cooper, 1949, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513; Chaplinsky v. State of New Hampshire, 1942, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031; Cox v. State of New Hampshire, 1941, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049." (Page 726)

Even though motion pictures are under the liberty of expression granted by the First and Fourteenth Amendments to the Constitution, there is not a requirement of "* * * absolute freedom to exhibit every motion picture of every kind at all times and all places * * *." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) The Court recognized that motion pictures as and of themselves, can possess a greater capacity for evil, and particularly among the young people of the community, beyond that of other modes of expression. The solemn and compelling interest of the state to protect its youth has been clearly expressed.

Certainly, this Court as late as May of 1967 indicated that the state's concern for the juvenile was, and is, a proper grounds for distinction in the cases. In *Redrup v. New York*, 386 U.S. 767, it made note of the fact that in none of the cases decided therein was there any claim of "a limited and specific concern for juveniles." Surely the Court would not have made this comment unless it could have a bearing on the outcome of the decision. The Court again recognized the distinction as set out in *Prince v. Massachusetts, supra*, and *Butler v. State of Michigan, supra.*

To limit classification, as opposed to censorship, to only those films portraying obscenity beyond any redeeming social value completely ignores the detrimental and damaging effect that sexual promiscuity, abnormal sex relations, extreme brutality and criminal violence or depravity exert upon the immature mind. It can be a disease implanted in young persons. Such a disease once implanted, reflects upon the whole of society and particularly upon the individuals

most closely concerned. It becomes not only a personal problem but a social problem of state and local concern. The words will stand "* * * If there be capacity for evil it may be relevant in determining the permissible scope of community control, * * *." *Burstyn v. Wilson, supra,* (page 502)

The position of the Supreme Court has been one which indicates an acceptance of the concept of "variable obscenity" and a logical follow through of the process of reasoning would likewise grant a classification that varied as to young persons as distinguished from adults. Where the classification did not amount to a total censorship but allowed the showing under protected circumstances there should be no requirement of the test of total obscenity which implies total censorship. Freedom of expression is not denied, nor does the ordinance attempt to restrict the exhibition or distribution of any motion picture. It merely sets forth the requirements as to the conditions under which a young person under the age of sixteen years may view a motion picture classified as "not suitable for young persons." The Dallas ordinance does not attempt to tamper with anyone's work product, nor does it attempt to tread on a person's constitutional right to speak or to make a motion picture, but it merely attempts to protect the young, innocent and immature from exposure to motion pictures that are obviously adult entertainment and have no social value to young persons.

An ordinance such as the Dallas ordinance should not be treated as though it were one which is completely prohibiting the dissemination of material. This is a restraint that is used when obscene material is being dealt with. Considera-

tion should be given to the fact that the protection of young persons is certainly one of the duties and obligations of the state. The gist of the ordinance and the impact of the ordinance is the protection of the young person—it is not a prohibition on the right of free speech as such. It is merely a classification of the material that is being disseminated in such a manner as to allow the parent to make his choice and the state to aid the parent in the protection of the home and of the young person. Did the writers of the Constitution intend that the state could not protect the home? Or even by the requirements of advertising and notification allow the parent to protect his own home? The state has even gone so far as to provide for protection of the young person in a situation where there is no parent available to provide his own protection. Is this reprehensible?

Even if we are dealing with obscenity as such, this Court has seen fit to define it in the terms of "appeal", that is, the appeal to the prurient interest. *Roth v. United States, supra.* For this reason there has been a distinction made between the appeal to one group and the appeal to another group. Photographs that were concededly obscene when judged by "contemporary community standards" were not so when the recipient was the Kinsey Institute for Sex Research.* The recognition between the different types of audiences to which the movie is to be shown, certainly could be a basis for some sort of a meaningful constitutional distinction. This should be so even insofar as any prior restraint or as in the case of the Dallas ordinance, prior classification is con-

* United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957)

cerned, Children are not the same as adults. In spite of the "heavy burden" insofar as general censorship is concerned, the burden should not be the same insofar as age classification is concerned. This should depend upon "the extent of governmental interest, the magnitude and probability of social harm, and the degree of the restriction on free expression."*

3.

THE DALLAS MOTION PICTURE CLASSIFICATION BOARD AND THE LOWER COURTS APPLIED CONSTITUTIONAL STANDARDS IN CLASSIFYING "VIVA MARIA" AS "NOT SUITABLE FOR YOUNG PERSONS" UNDER THE DALLAS CLASSIFICATION ORDINANCE.

Both the Appellants, Interstate Circuit in Pages 33 to 36 of its brief, and United Artists in pages 25 to 39 and 40 to 48 of its brief, have taken the position that the wrong basis was used by the Board in classifying the movie "Viva Maria" as "not suitable for young persons" and that the lower courts used an improper standard in deciding the case. Both Appellants are basing their argument upon the standard of obscenity used when material is completely suppressed. If it is obscene, there is no constitutional protection. *Roth v. United States, supra.*

As we have pointed out in other parts of our brief, young persons have been denied many privileges in the protection

* "For Adults Only", The Constitutionality of Governmental Film Censorship by Age Classification, supra.

of the public interest that have not been denied to adults. Even First Amendment guarantees have been subject to certain controls insofar as young persons are concerned when they are not subject to the same controls insofar as adults are concerned.

The Court should not lose sight of the fact that the Dallas ordinance does not attempt to suppress any material. It simply provides that if certain motion pictures are found to be "not suitable for young persons" they shall be exhibited and advertised as such. Even in these cases, the young person under the age of sixteen years, accompanied by a parent, guardian, husband or wife may view such a film. Section 46A-4(d) of Ordinance No. 11284 (R. 127).

It appears to us to be significant that this Court has not indicated in the decisions dealing with a prior submission of film, that the party to whom they are submitted must make a specific finding of fact. The rules concerning prior submission in the case of absolute censorship, which were set forth in the *Freedman* case, generally state that the board must assume the burden of showing that the film is unprotected expression; that it must not have an administrative procedure which lends an effect of finality to the determination by the board; the board must either issue the license or go to court to restrain the showing within a brief period of time; and the procedure must insure a prompt final judicial decision. There is nothing in this decision to indicate that there must be any finding made by the board itself. In fact, if such a finding were actually made, it would have no effect upon the trial court because it is the province and the duty

of the trial court to try the case as though no previous finding had been made. Since the burden rests upon the board to prove that the film should be classified as "not suitable for young persons", any previous determination made by it would be nothing more than a self-serving declaration. It appears that this was the feeling of this Court in writing that opinion, to assure that a truly adversary proceeding and a de novo trial is held before the trial court.

At the same time the Court pointed out that there is a model that was set forth in the *Kingsley Books, Inc., supra* case. Reference to that case shows that the model provides that the chief executive officer or chief legal officer of a city, if he thinks a person is about to sell or distribute obscene or indecent magazines or books contrary to the penal laws of the State of New York, may maintain an action for an injunction against such person to prevent the further sale or distribution. The statute itself states:

> "4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, * * *" (Page 438)

This being true, we submit that the cases referred to by the Appellant, United Artists Corporation on page 40 of its brief are not applicable to this particular situation. Three of those cases dealt with a municipal code of Chicago, which

involved a determination by the Commissioner of Police in the first instance, and then an appeal from his action to the mayor and then to the courts.*

The other case deals with an appeal from a juvenile court which is an entirely different type of proceeding.**

The above cited cases involve the Municipal Code of Chicago authorizing the total suppression of motion pictures on the ground of obscenity. The City of Dallas Motion Picture Classification Ordinance provides for a public hearing for an exhibitor or his designated representative to present evidence in support of his proposed classification. The particular section being Section 46A-3(b) reads as follows:

> "(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification on the film in question." (R. 124)

There is testimony in the record showing matters that were considered and found by the Board. It is evidence

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* *American Civil Liberties Union v. City of Chicago*, 13 Ill. App. 2d 278, 141 N.E. 2d 56 (1957); *Capitol Enterprises, Inc. v. City of Chicago*, 260 F. 2d 670 (7th Cir. 1958); *Zenith International Film Corp. v. City of Chicago*, 291 F. 2d 785 (1961)

** *Kent v. United States*, 383 U.S. 541 (1966)

from the testimony of Reverend Maceo, Rector of St. Pauls Episcopal Church in Dallas and a member of the Board, which is as follows:

"Q. Subsequent to this filming of this movie for the purpose of bidding the board to arrive and determine a classification, did the board have a subsequent meeting and discuss the movie?

"A. Yes, they did.

"Q. The full board?

"A. Yes.

"Q. Did the board generally have a lengthy discussion on what proper type of classification which in the judgment of the board should be given this movie?

"A. Yes, I think it was fairly lengthy. I don't believe it was as long as some but longer than the vast majority.

"Q. And the board arrived at the determination that it should be classified as not suitable for young persons?

"A. Yes, they did." (R. 80)

"Q. And in your opinion would this type of movie viewed as a whole have any detrimental effect whatsoever on young people below the age of sixteen years?

"Mr. Hartt: If the Court please, that is not the standard of the ordinance.

"The Court: I will let him answer.

"Mr. Hartt: 'Detrimental' is not a test for the classification of pictures at all and we object to it.

"The Court: I will overrule it.

"Mr. Hartt: Note our exception.

"A. Yes, I do believe it would be.

"Q. Why?

"A. In this sense, that is shows no explicit scenes of sexual intercourse as such but it does imply very clearly that such does occur. I think it does show this, and that the detrimental effect is to show that sexual expression between a man and a woman or any two people of the opposite sex is something that can be entered into without responsibility and continuing commitment, that it equates [fol. 102] sexual feeling and expression with the word 'love,' that—

"Mr. Hartt: If the Court please, if he would slow down, I'd like to note it.

"The Court: Sir?

"Mr. Hartt: If he would slow down I'd appreciate it so we can make some notes on this.

"The Court: Well, I can't control his modulation. Proceed, Reverend.

"A. The scenes of the relationship between Miss Bardot and various men in the movie, as well as between Miss Moreau and at least one man in the movie, indicates that the attraction between the man and the woman is something which is to be fulfilled almost upon first meeting; that there is no evidence of true affection and continuing responsibility between the people. It implies that people can meet, see each other, and immediately, without too much other duration of time or of exchange of personal responsibility and commitment, can enjoy each other sexually, part, and therefore no harm. As a matter of fact, this is all a matter of one of the joys of life and is great, is magnificent, is wonderful, as such, and I think this type of relationship is not true and that it is misleading and shows it as acceptable and approved behavior.

"Q. In your judgment, what this picture portrays is directly contrary to our accepted moral standards?

"A. Yes, it is.

"[fol. 103] Q. I believe the gist of your testimony then with reference to this then is it does portray sexual promiscuity in such a manner which is likely to encourage juvenile delinquency?

"Mr. Hartt:: We object to leading and putting words in the witness' mouth.

"The Court: I will let him—

"Mr. Hartt: He is fixing to read from the ordinance. He can tell his opinion about what it is without being read.

"The Court: Overrule it.

"Mr. MacMaster: He was objecting because we weren't following the ordinance a while ago.

"Q. Encourage juvenile delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest?

"A. Yes. I think this movie would lead to their sexual promiscuity, that it could.

"Q. Then in your judgment this violates this standard set in the ordinance I have just read?

"A. Yes, I do." (R. 80, 81, 82)

As further evidence before the court, the testimony of Mr. Gilliland is as follows:

"Q. Were there any scenes in the movie that portrayed the women disrobing the men?

"A. One scene involved that sort of thing. This is the one mentioned earlier where the hero of the revolution was chained up in the jail and Maria No. 2—there was a strong man in the movie—Maria No. 2 started rattling the bars because she wanted to get in to see her hero and the strong man parted the bars for her. She went in, embraced him, they spoke,—I don't remember what they said particularly,—but she

tore his shirt off to the waist, and as far as disrobing goes, that is all she did to him. I think she tore her shirt off partially, or wholly off maybe.

"Q. Was there any indication that she disrobed him any further or any hint of it or any such thing as that?

"A. Well, there was some indication. The camera, of course, did not allow any particular view.

[fol. 91] Q. This was the part left to the imagination, if any, is that right?

"A. I'd say so, yes, sir.

"Q. Were there any scenes of seduction in the movie, as you recall?

"A. Seduction. At this time I don't remember if there were any such scenes or not.

"Q. Was the general—What was the general tenor of the movie so far as sex was concerned, in your opinion?

"A. It was a strain that was carried throughout the movie, I think. Regardless of what happened, it was one of these things that was still there, still present.

"Q. Well, what type of sex?

"A. Well, as I said before, from start to finish it was a loose sort of conduct, we will say, promiscuous sort of thing.

"Q. Was it portrayed in the sense of being acceptable?

"A. Very much so.

"Q. Portrayed in the sense of being desirable?

"A. Very much so." (R. 72, 73)

Mr. Gilliland was a member of the Board and this testimony indicated the basis on which the Board was making its finding. The Appellant United Artists Corporations, on page

47 of its brief, attempted to indicate that Mr. Gilliland was not qualified as a witness because his only qualification was that he was the father of two children. This is a misstatement. Mr. Gilliland is also an attorney who at the time had been practicing law approximately six years (R. 44). As such he could have been elected to the district court bench and could have been the judge who made the final decision in this matter. Certainly if this does not qualify him, then it is the equivalent to saying that the judge who sits as the court to try the case is not qualified to make such a determination.

Even if we were to assume, which we certainly do not, that the ordinance as applied to the movie "Viva Maria" was improperly applied—if we were even to assume arguendo that the Board or the trial court applied the wrong test, this within itself would have no bearing on the constitutionality of the ordinance as such. It would be controlling only insofar as the application of the ordinance to that movie. This is the sum total of the argument of the Appellants when they state that, in their opinion, the ordinance as applied by the Board and the lower court imposed an unconstitutional restraint on the exhibit of the motion picture "Viva Maria"

III.

WHEN THE EFFECT ON THE FIRST AMENDMENT FREEDOM IS MINIMAL AND THE PUBLIC INTEREST IN PROTECTING YOUNG PERSONS IS SUBSTANTIAL, THE CASE SHOULD BE DECIDED ON THE BALANCING TEST.

(1) The City of Dallas Ordinance No. 11284 is a narrowly drawn ordinance and is directed toward a particular segment of our society. It falls within the permissible restraint doctrine enunciated by this Court. The way to come to grips with this problem in the application of this ordinance is to begin with the basic premise enunciated by this Court in the case of *Breard v. Alexandria*, 341 U.S. 622 (1951) which involved an ordinance of the City of Alexandria, Louisiana, prohibiting canvassers and peddlers from calling upon the occupants of private residences without having been requested or invited to do so. The Court held that the ordinance did not violate the First Amendment on freedom of speech or the due process clause of the Fourteenth Amendment by imposing an unreasonable restraint on the right to engage in a legitimate occupation. It will also be noted that the Court in that case also held that freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses; but the right to do so must be adjusted to the rights of others, the Court saying at page 642:

> "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where,

> when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life."

(2) This same balancing of the private and public interests was forcibly stated in *American Communications Association v. Douds*, 339 U.S. 382, 397 (1950):

> "* * * When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. * * *"

This Court has apparently subscribed in the past to the doctrine that every freedom carries with it a concomitant responsibility. The freedom is that of the individual. The reponsibility is his debt to society in return for the freedom. This is still sound doctrine.

(3) This Court has in a number of cases applied the balancing test where the security interest of the state outweighed the private rights of individuals or associations who claimed infringement of rights under the First Amendment. For example, the Court sustained the right of the sub-commmittee of the House Committee on Un-American Activities to make inquiries into witnesses' past and present membership in the Communist Party, by holding that this did not offend the First Amendment. *Barenblatt v. United States*, 360 U.S. 109 (1959), reh. den. 361 U.S. 854; *Wilkinson v. United States*, 365 U.S. 399 (1961) reh. den. 365 U.S. 890; *Braden v. United States*, 365 U.S. 431 (1961), reh. den. 365 U.S. 890.

(4) The Court reached the same conclusion in a number of cases in holding that the security interests of a state were sufficiently compelling to outweigh the associational privacy of persons who attend a summer camp which a state legislative investigating committee had valid reason to believe might have had subversive persons as speakers and guests. *Uphaus v. Wyman*, 360 U.S. 72 (1959), reh. den. 361 U.S. 856.

(5) The registration and disclosure provisions of the Subversive Activities Control Act (50 USC § 786) requiring foreign-dominated Communist-action organizations to reveal the names and addresses of their officers and members, as well as a list of all printing presses in their possession and control, and also requiring a finincial account, was held by this Court not to be in violation of the First Amendment. *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961) reh. den. 368 U.S. 871.

(6) The Smith Act (18 USC § 2385) making it a felony to hold active membership in an organization which advocates the overthrow of the government by force or violence, by application of the balancing test, was held to be valid. The Court held that it was necessary to deal with the evils which Congress has a right to prevent and the Act did not restrict freedom of association more than was necessary to deal with this evil. *Scales v. United States*, 367 U.S. 203 (1961) reh. den. 366 U.S. 978.

(7) This Court also applied the balancing test in the case of *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), reh. den. 368 U.S. 869; *Re Anastaplo*, 366 U.S. 82 (1961) and *Kovacs v. Cooper*, 336 U.S. 77. *Konigsberg* (1949) held that a state may deny an application for admission to the Bar on the ground that by refusing to answer questions relating to the applicant's membership to the Communist Party the applicant has obstructed the bar examining committee's required investigation into his qualifications. The state's interest in having lawyers who are devoted to the law in its broadest sense, is sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure.

The ordinance involved in the case at bar, when viewed in the light of the balancing test as illustrated in the cases cited above, clearly has a minimal effect on any claim by the movie exhibitor or producer that its application is not constitutionally permissible. As heretofore pointed out the interest of the state in the welfare of the children clearly outweighs any right of an exhibitor or producer of a movie film to profit from a so-called freedom to the child's detriment. Therefore it is respectfully submitted that this Court should hold the ordinance to be constitutional in the face of the claim that its application results in a burdensome prior restraint:

(1) On the ground that the result can easily be reached by the balancing test; and

(2) That the producer or exhibitor is afforded a prompt final judicial review under the varied provisions of the ordinance;

as was held by the Court of Civil Appeals of Texas, as well as the United States Court of Appeals for the Fifth Circuit.

IV.

CONCLUSION

Based upon the foregoing reasons, Appellee prays that said judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be affirmed.

Respectfully submitted,

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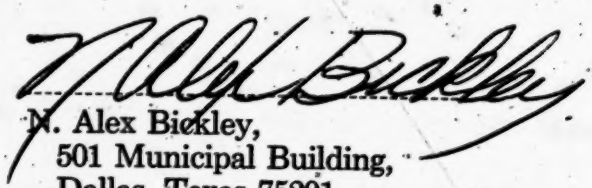
CERTIFICATE OF SERVICE

A copy of this Brief has been served upon Mr. Dan McElroy and Mr. Paul Carrington, attorneys for Appellant-Intervenor, United Artists Corporation, by delivering the same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas, and Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them at their offices located at 3525 Southland Center, Dallas, Texas



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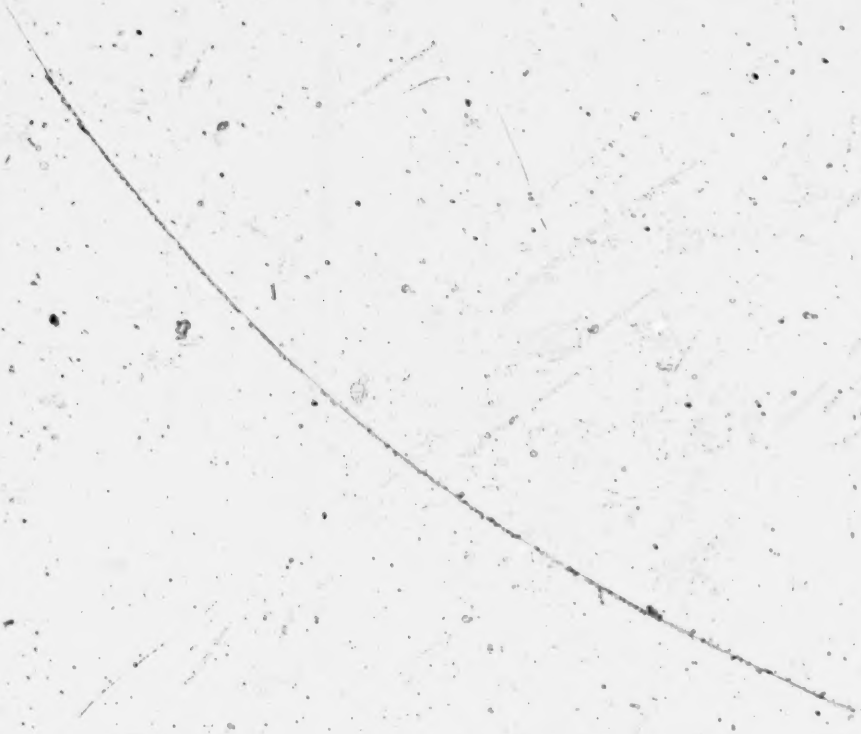

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 56

INTERSTATE CIRCUIT, INC.,
Appellant,

v.

CITY OF DALLAS,
Appellee.

On Appeal From the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

REPLY BRIEF OF APPELLANT INTERSTATE CIRCUIT, INC.

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REPLY BRIEF OF APPELLANT INTERSTATE CIRCUIT, INC.

City Has Changed Its Position on Construction of Freedman v. State of Maryland

This Court's decision in *Freedman v. State of Maryland*, 380 U.S. 51 (1965) requires that a prompt final judicial review of the censor's action be assured in prior censorship cases, either by statute or authoritative judicial construction. Heretofore, the City understood, or seems to have understood, the clear meaning of the *Freedman* language

> "Therefore, the procedure must also assure a *prompt final judicial decision* * * *." (p. 59, emphasis added)

to require a decision by a Texas court of civil appeals and the Supreme Court of Texas. Now, the City contends that this language requires only that there be a prompt judicial determination in an adversary proceeding before a *trial* court. Appellee's Brief, pp. 2-11.

A brief examination of the history of Dallas City Ordinance 11284, and the attendant litigation, will reveal the reason for the City's shift in position.

Dallas has been trying desperately to have some kind of censorship. Dallas City Ordinance 10963 was passed on April 5, 1965. The local exhibitors, including the appellant herein, brought suit to have it declared unconstitutional. *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906 (N.D. Tex. 1965). The provision of that ordinance for judicial review is found in Section 7, set out on page 916 of the opinion. The court found that, "* * * there being no provision in Texas statutes for prompt judicial review in the *trial* and *appellate courts* * * *." (p. 911, emphasis added), the ordinance was unconstitutional because it did not provide for judicial review satisfying the *Freedman* requirements.

Two weeks after that decision the present ordinance was passed. R. 121-134. Section 7, relating to judicial review, was substantially expanded. The paragraphs of that section make detailed provisions for the waiving of notice, shortening of the time allowed for reply briefs, and joint filing of motions to advance in the Court of Civil Appeals and the Supreme Court of Texas.

Following the passage of this second ordinance, the local exhibitors again brought suit. *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19 (N.D. Tex. 1965).[1] The City's answer in that case provided in part:

> "This Defendant affirmatively alleges that it has been the practice of both trial and appellate courts in this State to advance the hearing or submission of a cause when requested to do so by the parties involved, particularly when one of the parties is a political subdivision such as is this Defendant, and the matter to be litigated affects the public in general resulting from the exercise of police powers, such as is involved in the case at bar, which requires a speedy determination, therefore, the ordinance in question is constitutional as applied to the Plaintiffs, because as enacted it affords the Plaintiffs prompt judicial review as a matter of law."

Record in the United States Court of Appeals for the Fifth Circuit, p. 51.

To sustain its claims regarding prompt judicial review in the trial and appellate courts in Texas, during the trial of this second ordinance, the City called Judge Dick Dixon, Chief Justice of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, sitting at Dallas, as a witness. Record in the United States Court of Appeals for the Fifth Circuit, p. 384.

Persuaded by the arguments and testimony, the District Court found that "The appellate courts of Texas have likewise made it a policy to advance cases * * *." and that "* * * a final hearing could be obtained in the Supreme

[1] A Petition for Certiorari in this case is now pending before this Court styled *Interstate Circuit, Inc., et al. v. City of Dallas*, No. 41, October Term, 1967.

Court of Texas in less than thirty-five days." Findings IX and X, 249 F. Supp. 19, 23.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment, referring to the finding of the District Court that a final judgment could be obtained in the Texas Supreme Court in thirty-five days. *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, 600 (1966). Even so, that court's approval was conditional. The court stated, "So long as the courts are willing to cooperate in this manner (recited history of *Viva Maria* in trial court in early hearing in the Court of Civil Appeals) *Freedman's* requirements for speedy judicial action on the merits and *on review* are satisfied." (p. 601, emphasis added)

Interstate's first point for reversal is directed to the failure of Ordinance 11284 to assure a prompt final judicial decision to review the acts of the Classification Board. Interstate Brief, p. 11. Interstate contends that the delay of 247 days before a final decision of the Texas courts is obtained does not satisfy *Freedman's* requirements.

In its brief, the City does not defend the delay as being within the limits of a reasonable requirement established by *Freedman*. It does not defend the "system" which it used to secure Judge Hughes' findings that a final determination can be obtained from the Supreme Court of Texas in less than thirty-five days. It does not explain why it enacted such a detailed provision for appellate review and why it called Judge Dixon as a witness in the case before Judge Hughes. These actions are not consistent with the

interpretation which it now places upon the *Freedman* requirements.

This change in position by the City, in construing Freedman's requirements of a prompt final judicial determination to mean a judgment of a trial court instead of meaning a final judicial determination by the Supreme Court of Texas, is necessary in order for it to avoid a more difficult problem—the explanation of the eight and one-half month delay before a final judicial decision that *Viva Maria* is not suitable for young persons in Dallas.

Now that it is proven that cooperation is not obtained by the Texas Supreme Court and that there is no thirty-five day trial, candor requires that the City either confess that its ordinance does not provide a prompt final judicial determination and that it is unconstitutional, or explain (1) why it wasted words about judicial review in a long ordinance about a subject that is not relevant, (2) why it wasted the time of Judge Dixon individually and as a witness, and (3) why it has urged the courts of the United States at all levels to approve a system of appellate review for motion picture censorship which it now says is unnecessary.

The City cites two cases to support its contention that promptness is required only at the trial court level. *United States v. 56 Cartons Containing 19,500 Copies of Magazines*, 373 F. 2d 635, (4th Cir. 1967) involved the importation of *undated* nudist magazines. *United States v. One Carton Positive Motion Picture Film*, 367 F. 2d 889 (2nd Cir. 1967)

involved the importation of the motion picture "*491*". In the latter case, the importer delayed answering and asked for a recess, all of which is set out in the opinion. Although the case concerned a motion picture, the picture had not been released for public distribution and exhibition, as *Viva Maria* was when the present case arose. This court has recognized the ephemeral value of motion pictures in the *Freedman* case. 380 U.S. 51, 61 (1965).

Ordinance 11284 Prohibits the Exhibition of Motion Pictures on Standards That Are Vague and Ambiguous

Section 46A-1(f) of Dallas City Ordinance 11284 lists terms such as "delinquency" and "harmful effects" as standards for the Classification Board to use in determining whether a film is not suitable for young persons. These have been discussed in detail in Interstate's Brief beginning on page 21, and particularly on page 24. Words of this nature which lack a precise meaning have been held to be too vague to serve as a standard for censorship as is illustrated in the brief. Rather than to admit this point, the City addresses itself to a platitude that the parent is responsible for and should direct the training of the young mind and of the young person. Appellee's Brief, p. 18. Even if it is conceded that there is something less than obscenity which is a detriment to the community, and to the people that live in it, this does not help the ordinance provide a valid standard of censorship. Neither the standards of "not suitable for young persons" as defined in the ordinance, nor any case cited by the City, tells us what this particular

"something" is that is less than obscenity which is a detriment to the community and the people that live in it. This argument gives no precision to the words such as "harmful effects" which the ordinance directs the board to use in classifying motion pictures.[2]

The City has consistently refused to base its attempted classification upon obscenity in order to avoid coming within the scope of decisions announced by this Court defining obscenity and protecting as free speech material which is not obscene. Yet, on page 19 of its brief, as it has done on other occasions, the City uses terms which are considered to be synonyms of "obscene", i.e., "filth" and "salacious material", to describe the subject matter found in various motion pictures. Neither "filth" nor "salacious material" is found anywhere in the terms describing "not suitable for young persons" in the ordinance.

By using its own definition of "not suitable for young persons", the City avoids the restrictions of an obscenity test. It tries to justify its definition because the material is only censored for young persons. Yet, when it describes the material which is harmful for children, it uses "filth" and "salacious material", which, to the layman, are the equivalent of "obscene". Both law and common sense should require that the City either restrict its censorship to that which is obscene without using synonyms, or find constitutional support for its definition of "not suitable for young

[2] As a matter of interest, according to a report in the *Dallas Times Herald* of November 6, 1967, the board doesn't even use this vague standard. As reported: "Members say they make their judgments on the basis of 'would I want my youngster to see this movie?'."

"persons" without equating the verbiage of the ordinance to synonyms of obscenity.

Texas has a law against obscenity—Article 527, Texas Penal Code.

The City wants to censor material that is not obscene. There is no dispute about obscenity because the Appellant does not contend for the right to show obscene pictures. Its pictures are not obscene. If the City is to censor material which is "not suitable for young persons", as defined by the ordinance, then it should justify its definition without resorting to terms which are considered equivalent to obscene. Stripped of the poisoning effect of "filth" and "salacious material", the City still has the burden of sustaining its definition of "not suitable for young persons". R. 121-122. It has cited no opinions by this Court to support its definition. There are none. Its resort to synonyms of obscene should not cloud the issue. The standards of the ordinance are unconstitutional.

The City cannot make *Viva Maria* obscene by arguing that "filth" and "salacious material" are found in some motion pictures. This picture is not obscene. Its exhibition to anyone cannot be restricted, and it cannot be censored, by any test that has been approved by this Court.

The City misconstrues *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1965) when it states, on page 22 of its brief, "The Court recognized that motion pictures as and of themselves can possess a greater capacity for evil and particularly among the young people of a community, beyond that of other modes of expression."

The exact language of the Court in that case is as follows:

> "*It is further urged* that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the possible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). (emphasis added)

Another assertion overstating facts is made at the bottom of the same page where the following language is found:

> "To limit classification, as opposed to censorship, to only those films portraying obscenity beyond any redeeming social value completely ignores the detrimental and damaging effect that sexual promiscuity, abnormal sex relations, extreme brutality and criminal violence or depravity exert upon the immature mind. It can be a disease implanted in young persons. Such a disease once implanted, reflects upon the whole of society and particularly upon the individuals most closely concerned. It becomes not only a personal problem but a social problem of state and local concern."

There is no reference made to the record of this case to support these statements which the City asserts to be established facts. No citation can be given to support this series of conclusions, and there is not a scintilla of evidence in the record to support them.

The City has made an error which is common to many who prate against "obscenity". This error is recognized by

writers who have attempted to make responsible investigations into the subject of erotica and pornography.[3]

If these unsupported charges and spurious facts can be wiped from the record, it will be easy to see that the standards of the ordinance are uncertain, vague, and unconstitutional.

The City recognizes that censorship is said to come before this Court with a "heavy burden." Ordinance 11284 cannot meet the constitutional requirements imposed upon a censorship for obscenity.

There is no question that the state has the authority to regulate the admission of children to pool halls, their use of alcoholic beverages, their right to drive automobiles, to vote, and to purchase firearms. The lengthy analogies used by the City on these subjects to establish the right to regulate free speech for children is neither valid nor relevant unless the City wishes to contend that the right to enter a pool hall, or to drink alcoholic beverages, is protected by the Constitution of the United States as a basic or fundamental freedom. Similar analogies have been made before and have been rejected by this Court. *Marcus v. Search Warrants of Property, Etc.*, 367 U.S. 717, 730 (1961).

[3] See *Sex Offenders*, Gebhard, Gagnon, Pomeroy and Christenson, of the Institute of Sex Research, Inc., Harper and Rowe, 1965, p. 670 where it is stated:

> " * * * With great assurance many persons state that exposure to erotica and pornography leads to moral decay and sex offenses. The axiomatic character of these statements would lead one to the conclusion that incontrovertible scientific evidence had been adduced, either of an experimental or survey character, for their support. The present state of confusion in the courts and legislatures is ample evidence that these purported causal relationships have not been subjected to any scientific test. * * * "

The "Balancing of Interests" Test is Inapplicable.

The balancing test advocated by the Appellee in its brief (p. 34) was used by this Court in *Breard v. City of Alexandria, La.*, 341 U.S. 622 (1951) in upholding the validity of a city ordinance that restricted door-to-door solicitation by uninvited salesmen. It was also used in sustaining the contempt convictions of persons who refused to answer questions asked them by the House Un-American Activities Committee relating to their alleged membership and activity in the Communist Party. *Barenblatt v. United States*, 360 U.S. 109 (1959) reh. denied 361 U.S. 854; *Wilkinson v. United States*, 365 U.S. 399 (1961) reh. denied 365 U.S. 890. Other cases, mostly involving problems arising from contempt of Congress citations or Smith Act prosecutions, are cited on pages 34-37 of Appellee's Brief. However, as was stated in *American Communications Association v. Douds*, 339 U.S. 382, 397 (1950), and *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449 (1958), the interest of the State to warrant the abridgment of First Amendment rights must be substantial or compelling. The question thus presents itself as follows: Is the interest of the State in forbidding the exhibition of certain movies, not legally obscene, to persons under sixteen (16) years of age, compelling or substantial?

Appellee has cited no facts, either within or without the record, that lend support to its contention that certain movies, not classed as obscene, are or can be harmful to a "child's welfare". There are none. The first classification

ordinance passed by the City, No. 10963, recited in its preamble that "there has been a serious increase in crime, delinquency and sexual promiscuity on the part of young persons of school age within the City * * *." *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906, 912 (N.D. 1965). As a matter of fact, there was no such increase, and the recitation was dropped from the preamble of Ordinance No. 11284. This present ordinance does recite that "certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; * * *". R. 120. There is not a shred of evidence anywhere to support this finding.

Evidence directly controverting this allegation of the ordinance was produced by the City from Captain Frank Martin, who was in charge of the Juvenile Bureau of the Police Department. He testified as follows:

> "Q. Captain Martin, is the problem concerning morals charges with juveniles decreasing or increasing in the City of Dallas?
>
> "A. I'd say it is just about stable. It is not much increase, not much decrease.
>
> "Q. It has been with us all the time?
>
> "A. It stays with us, yes, sir.
>
> "Q. You are not testifying as to what causes this, are you?
>
> "A. No. I don't know.
>
> "Q. But you are testifying that there is a problem here? (fol. 125)
>
> "A. Yes, sir."

The use of the balancing test has never been permitted in censorship cases. The general rule is that material may be censored, if obscene; if not, it cannot be. *Roth v. United States*, 354 U.S. 476 (1957); *A Book, Etc. v. Attorney General of Commonwealth of Massachusetts*, 383 U.S. 413 (1966). The rule has been slightly modified to permit censorship of material that is obscene as to certain clearly defined deviant sexual groups. *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. State of New York*, 383 U.S. 502 (1966). There is absolutely no showing that *Viva Maria*, the film in question, or any other film which the City intends to classify as "not suitable for young persons", is designed to appeal to any such clearly defined deviant sexual group, or that young persons under sixteen (16) years of age are a clearly defined deviant sexual group. The ordinance generally, and as applied to *Viva Maria*, is unconstitutional.

Based upon the foregoing, and for the reasons set out in Appellant's brief, Appellant prays that the judgments below be reversed.

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PROOF OF SERVICE

I, Grover Hartt, Jr., one of the attorneys for Interstate Circuit, Inc., Appellant herein, and a member of the Bar of The Supreme Court of the United States, hereby certify that, on the 5th day of January, 1968, I served copies of the foregoing Reply Brief of the Appellant Interstate Circuit, Inc., on the several parties hereto, as follows:

1. On Appellee City of Dallas, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. N. Alex Bickley, City Attorney, 501 Municipal Building, Dallas, Texas, attorney of record for the City of Dallas.

2. On Intervenor United Artists Corporation, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. Paul Carrington and Mr. Dan McElroy, 1900 Mercantile Dallas Building, Dallas, Texas, attorney of record for United Artists Corporation.

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MAR 16 1967
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In the

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1155~~ 64

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from
The Fifth Supreme Judicial District of Texas

JURISDICTIONAL STATEMENT

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In the

Supreme Court of the United States

OCTOBER TERM 1966

No. .....

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from
The Fifth Supreme Judicial District of Texas

JURISDICTIONAL STATEMENT

Appellant United Artists Corporation (hereinafter referred to as United Artists) appeals from the final judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas entered on April 5, 1966,[1] and with respect to which the Supreme Court of Texas denied United Artists' Application for Writ of Error,

[1] Said judgment is also the subject of a pending appeal to this Court in No. 1109, Interstate Circuit, Inc. v. City of Dallas, filed March 3, 1967.

no reversible error, on July 27, 1966, an action made final by the overruling of Motions for Rehearing on October 19, 1966. Said judgment affirmed the trial court's temporary injunction prohibiting exhibition or advertisement of United Artists' feature motion picture "VIVA MARIA" within the city limits of the City of Dallas, except as "not suitable for young persons," as that term is hereinafter defined. United Artists submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of Judge A. R. Stout of the 40th Judicial District Court of Texas, sitting for the Judge of the 44th Judicial District is not reported. A copy of his oral opinion is annexed hereto as Appendix B, infra, p. App. B-1. The two concurring opinions of the said Court of Civil Appeals are reported at 402 S.W. 2d 770. A copy of each opinion is annexed hereto as Appendix C, infra, p. App. C-1. When denying United Artists' Application for Writ of Error, the Supreme Court of Texas announced no opinion.

JURISDICTION

Following said final judgement of said Court of Civil Appeals, United Artists timely filed an Application for Writ of Error in the Supreme Court of Texas. Following refusal of said Application by the Supreme Court of Texas, no reversible error, on July 27, 1966, United Artists filed

a timely Motion for Rehearing which was denied by the Supreme Court of Texas on October 19, 1966. (Appendix D, infra, p. App. D-2) From such denial, no further review or appeal was available to United Artists in the state courts of Texas and accordingly its Notice of Appeal to this Court was filed in the said Court of Civil Appeals, the court possessed of the record, on January 16, 1967.

This action began in the 44th Judicial District Court of Texas on February 14, 1966, when Appellee City of Dallas filed a civil action under authority of Dallas City Ordinance No. 11,284 (hereinafter referred to as the Dallas Classification Ordinance) against Interstate Circuit, Inc. (hereinafter referred to as Interstate), an exhibitor of motion pictures, to enjoin it from exhibiting the motion picture "VIVA MARIA" to persons under the age of 16 years within the city limits of the City of Dallas and to require all advertising of the picture to carry the classification of "not suitable for young persons." Over Appellee's objection, United Artists was permitted to intervene in such action and from that point forward it has been an active participant in all proceedings relating to the restricted exhibition of "VIVA MARIA."

Over the objections of United Artists and Interstate that the Dallas Classification Ordinance violated their respective rights of free expression under the First Amendment to the United States Constitution and deprived them, respectively, of due process under the Fourteenth Amendment thereto, trial was had to the Court without a jury on Appellee's prayer for a temporary injunction. The trial

court viewed "VIVA MARIA" in its entirety in the courtroom and granted Appellee a temporary injunction as prayed for.

This Court has jurisdiction of this appeal under 28 U.S.C. #1257(2), the courts below having rejected the timely claims of United Artists and Interstate that the Dallas Classification Ordinance is invalid because repugnant to the First and the Fourteenth Amendments to the Constitution of the United States. *Burstyn v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *Superior Films, Inc. v. Department of Education*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286; and, *Kingsley Int'l. Pictures Corp. v. Regents*, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362.

FINALITY OF THE JUDGMENT FOR APPEAL PURPOSES

Even though this appeal is one from the granting of a temporary injunction, the questions now presented, as hereinafter stated, are as fundamental to the further conduct of the case as the questions presented to, and resolved by, this Court in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 13 L. Ed. 2d 199, 203, 85 S. Ct. 308; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, note 3, 93 L. Ed. 1628, 1633, 69 S. Ct. 1457; *Land v. Dollar*, 330 U.S. 731, 734, note 2, 91 L. Ed. 1209, 1214, 67 S. Ct. 1009; and, *United States v. General Motors Corp.*, 323 U.S. 373, 377, 89 L. Ed. 311, 318, 65 S. Ct. 357.

Perhaps the formality of a trial on the merits of Appellee's prayer for a permanent injunction is theoretically yet unavailable to Interstate and perhaps to United Artists, al-

though it is not an exhibitor of motion pictures and thus has no standing under the Dallas Classification Ordinance to challenge classification or proposed classification of any motion picture. Assuming such a trial to be available, what could be accomplished thereby? The trial court has held the Dallas Classification Ordinance valid as enacted, has viewed "VIVA MARIA," and has held it to be "not suitable for young persons" as that term is defined in said Ordinance. Any appeal from a permanent injunction judgment would of necessity be filed in the Court of Civil Appeals for the Fifth Supreme Judicial District. Two members of that three judge court have in this very case held the Dallas Classification Ordinance valid as enacted, have viewed "VIVA MARIA," have held it to be "not suitable for young persons" as that term is defined in said Ordinance, and, alternatively, have held it to be obscene under the tests of *Roth v. United States*, 344 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 8 L. Ed. 2d 639, 82 S. Ct. 1432; and, *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676. p. App. C-10, 11. While the granting of the temporary injunction may not, in the strict sense, be res judicata of the issues, under Texas decisions the law of the case has been finally established. *Furr's, Inc. v. United Specialty Advertising Company*, 385 S.W. 2d 456, 458-459 (Tex. Civ. App., wr. ref., n.r.e.); *Wilson v. Abilene Independent School District*, 204 S.W. 2d 407 (Tex. Civ. App., wr. ref., n.r.e.); *Baker v. Hill*, 35 S.W. 2d 779 (Tex. Civ. App., wr. dism.); and, *Hudspeth v. Guggenheim*, 12 S.W. 2d 238 (Tex. Civ. App., wr. dism.). As surely as was the situation

in *Mills v. Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 1434, trial of "VIVA MARIA" on the merits would be formal at most and would as surely lead to restricted exhibition of "VIVA MARIA" as "not suitable for young persons" as a trial of Mills would have led to his conviction.

There is no distinguishing difference between the present posture of the controlling issues in this case and those taken by this Court in *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 97 L. Ed. 1094, 73 S. Ct. 749; and, *Local No. 438 v. Curry*, 371 U.S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531. Especially where First and Fourteenth Amendment rights are jeopardized this Court should continue its long established policy of giving the requirement of judgment finality a practical rather than a technical construction. *Mills v. Alabama*, supra.

The Dallas Classification Ordinance provided an alternative to Interstate; it might have waived the temporary injunction hearing and consented to a trial on Appellee City's prayer for a permanent injunction. It chose not to do so, doubtless in the context of Rule 410, Texas Rules of Civil Procedure, which gives precedence in the Courts of Civil Appeals to appeals from temporary injunctions, but not from permanent injunctions. As this Court has heretofore recognized, in the area of motion pictures the exhibitor's limited interest in a particular feature, such as "VIVA MARIA," may too readily lead to unconstitutional restriction unless a prompt and speedy judicial review is assuredly available. *Freedman v. Maryland*, 380 U.S. 51, 59, 13 L. Ed. 2d 649, 655, 85 S. Ct. 734. Clearly the temporary injunction route promised, but did not necessarily deliver, the more prompt

review. Yet, regardless of its preference, United Artists, as Intervenor in the trial court, a party by sufferance rather than by right, had no alternative and no procedure available to it whereby it could insist that the trial as to "VIVA MARIA" result in a final, not temporary, judgment. As to United Artists, the present judgment is as final as it lay within its power to make it, and United Artists has no defenses, and will acquire none additional in the future, to the restricted exhibition of its motion picture "VIVA MARIA" within the city limits of Dallas, except the constitutional defenses now presented to this Court.

Since February, 1966, United Artists' property rights in "VIVA MARIA" have been partially taken from it; the audience which may view said motion picture has been restricted and limited. This will continue to be so unless the Dallas Classification Ordinance, as applied to this picture, is held by this Court to be unconstitutional. Is the withholding of a present right to exhibit (through Interstate or any other exhibitor in the city) significantly less damaging than an order directing the delivery of physical property? If not, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475, by analogy would dictate that this case is now ripe for review. United Artists' property rights in "VIVA MARIA" are of course diminishing with the passage of time and will doubtless be substantially extinguished by the time this case could again reach this Court after a formal retrial resulting in the granting of a permanent injunction.

LEGISLATIVE AND CONSTITUTIONAL PROVISIONS INVOLVED

Ordinance No. 11,284 enacted by the City council of the City of Dallas on November 22, 1965, is challenged herein as providing for restraints on the exhibition of the motion picture "VIVA MARIA," in the City of Dallas that are unconstitutional. Said Ordinance provides for the creation of a Motion Picture Classification Board which is to classify before their exhibition within the city limits of the City of Dallas all motion picture films as either "suitable for young persons" or "not suitable for young persons." The following portions of the Dallas Classification Ordinance are set out here, while the entire Ordinance appears in Appendix A, p. App. 1, infra:

> Section 46A-1.(d) "'Young person' means any person who has not attained his sixteenth birthday."
>
> Section 46A-1.(f) "'Not suitable for young persons' means:
>
> (1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or
>
> (2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.
>
> "A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on

the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

Section 46A-4.(a) "It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

* * *

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'."

Section 46A-7.(a) "Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County,

> Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance."

Section 46A-7.(c) "Failure of any exhibitor to file notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above."

United Artists urges that the restraints on the exhibition of "VIVA MARIA" by Interstate and other exhibitors in the City of Dallas, as provided by the Dallas Classification Ordinance and the action in this case by the courts below, are repugnant to the First Amendment to the United States Constitution and to Section 1 of the Fourteenth Amendment thereto.

QUESTIONS PRESENTED

I.

Whether the Dallas Classification Ordinance is in conflict with the First Amendment because by prior restraint it restricts the audience which may view a motion picture on grounds other than obscenity.

II.

Whether the Dallas Classification Ordinance is in conflict with the First and Fourteenth Amendments because of the vague, overbroad and indefinite standards for classi-

fication of a motion picture as "not suitable for young persons."

III.

Whether the Dallas Classification Ordinance contains adequate procedural safeguards, both as to exhibitors and distributors of motion pictures, to avoid conflict with the First and Fourteenth Amendments in view of the fact that it constitutes a prior restraint on exhibition of motion pictures.

IV.

Whether "VIVA MARIA," having been found by the lower court to have a "minimum of social value" to persons beneath the age of 16 years, may be restricted in its exhibition to an audience above the age of 16 years.

STATEMENT OF THE CASE

United Artists, as a national distributor of motion pictures, owns the exclusive domestic distribution rights to the feature motion picture "VIVA MARIA" which it licensed on January 17, 1966, to Interstate for exhibition in the Esquire Theatre, a commercial theatre within the city limits of the City of Dallas. Such agreement provided that United Artists should receive as its license fee 25% to 60% of the admission receipts of the engagement, depending on the box office gross. (Tr.[2] p. 9, Ex. A) Notwithstanding the obvious

[2] All references herein to "Tr.", "S.F.", "Brf.", "Mot. Reh.", and "Appl. Writ" are to the Transcript, Statement of Facts, Briefs, Motions for Rehearing, and Application for Writ of Error of United Artists, respectively, constituting a part of the record filed by Interstate in its companion appeal of this cause numbered 1109 and filed with the Clerk of this Court on March 3, 1967.

monetary interest of United Artists in any exhibition of "VIVA MARIA," Appellee's Motion Picture Classification Board established pursuant to City Ordinance 11,284 (p. App. A-1) classified "VIVA MARIA" as "not suitable for young persons" without any notice to, or opportunity to be heard by, United Artists on February 9, 1966. The effect of such classification was to exclude persons under the age of sixteen years from attending "VIVA MARIA" and to require all advertisements of it to carry the legend "not suitable for young persons." (p. App. A-8, 9, Secs. 46A-4(a) (2) and (5))

As permitted by the Dallas Classification Ordinance, Interstate filed on February 11, 1966, its notice of non-acceptance of the Board's action stating its intention to exhibit "VIVA MARIA" as suitable for a general audience; had such notice not been timely filed within the brief two day period allowed, the Board's classification would have become final without any judicial determination that "VIVA MARIA" was not protected expression under the First Amendment to the United States Constitution. (p. App. A-11, 14, Sec(s). 46A-7 (a) and (c))

Appellee filed an injunction proceeding against Interstate as the sole defendant on February 14, 1966, to require it to exclude from the "VIVA MARIA" audience persons under the age of sixteen years and to advertise the motion picture as "not suitable for young persons." (Tr. p. 1) As the grounds for such restrictions, Appellee alleged that "VIVA MARIA" portrayed:

> "* * * sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or en-

> courage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." (Tr. p. 4)

United Artists filed its Answer in Intervention on February 16, 1966 (Tr. p. 8), and, over the objection of Appellee (Tr. p. 35) that the trial court had no jurisdiction to determine the constitutional issues raised by said answer, was permitted to intervene. Thus, at the very inception of this case, United Artists timely asserted in said pleadings the repugnancy of the Dallas Classification Ordinance, particularly as applied to "VIVA MARIA," to the First and Fourteenth Amendments to the United States Constitution. Juries not being available in temporary injunction proceedings, the trial court viewed "VIVA MARIA" in its entirety in the courtroom, heard testimony and argument of counsel, concluded that,

> "* * * there are two or three features in this picture that look to me would be unsuitable to young people, * * * " (S.F. p. 109)

and granted on February 18, 1966, Appellee's prayer that exhibition and advertisement of "VIVA MARIA" be restricted as "not suitable for young persons". (p. App. B-1, 2)

United Artists thereupon gave timely notice of appeal to the Fifth Supreme Judicial District of Texas, sitting in Dallas, Texas, and timely filed on March 10, its Appellant's Brief. Therein, in Points of Error I, II, III, IV, VII and VIII, United Artists raised the constitutional issues now

presented to this Court (United Artists' Brf., pps. 3-9), again to no avail:

> "The two Appellants have filed separate briefs. Interstate Circuit, Inc., in its first six points on appeal, and United Artists Corporation in all of its ten points, assert that the ordinance and its application in this case are violative of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, Sections 8 and 19 of the Constitution of the State of Texas. We do not agree with Appellants." (p. App. C-3)

Two justices of said Court of Civil Appeals had viewed "VIVA MARIA" in the courtroom and had concluded that it was not a protected expression under the First Amendment to the United States Constitution. This conclusion was reached alternatively, that is, whether the motion picture were judged by the classification standards of the Dallas Classification Ordinance as enacted, or by obscenity standards enunciated by the United States Supreme Court, or by such standards "judged by the average young person." (p. App. C-10, 11)

Following denial of its Motion for Rehearing by said Court of Civil Appeals, United Artists timely filed an Application for Writ of Error in the Supreme Court of Texas on May 23, 1966. The questions presented herein were urged upon that court in Points of Error Two, Three and Four (United Artists' Appl. Writ, pps. 5-6), and said Application was refused, no reversible error, on July 27, 1966. (p. App. D-1) The Supreme Court of Texas so acted without itself viewing "VIVA MARIA." United Artists next filed a timely Motion for Rehearing, and then following the de-

cision of the United States Court of Appeals for the Fifth Circuit at New Orleans in *Interstate Circuit, Inc. v. City of Dallas*[3], 366 F. 2d 590, filed a Supplemental Motion for Rehearing to urge the Texas Supreme Court to consider anew the constitutionality of the Dallas Classification Ordinance in the light of said federal decision holding the classification standards (p. App. A-3, 4. Sec. 46A-1(f)) of said Ordinance invalid as enacted by the Dallas City Council and substituting in lieu thereof a totally new and different standard, "obscene when viewed by an audience of young persons," whereas the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas had held said classification standards valid as enacted without any obscenity limitation. All Motions for Rehearing were overruled by the Supreme Court of Texas on October 19, 1966. (p. App. D-2)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

That the federal constitutional questions presented herein are substantial and in need of resolution would seem to follow of necessity from the conflict between the judgment in this case and that of the Court of Appeals for the Fifth Circuit in *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, presently pending on Petitions for Certiorari before this Court under numbers 971 and 978. For example: May motion pictures to be exhibited in the city limits of the City of Dallas be constitutionally restricted to audiences

[3] Said federal suit was a declaratory judgment action, not involving a specific motion picture, in which the Dallas Classification Ordinance was held to be partially invalid and partially valid. It is the subject of two Petitions for Certiorari now pending before this Court, Nos. 971 and 978. United Artists was not a party to that suit, but did participate at the appellate level by means of amicus curiae brief and argument.

above the age of sixteen years based on the classification standards of the Dallas Classification Ordinance as enacted, in accordance with the state court judgment in this case, or may such restriction only be applied to motion pictures found to be "obscene when viewed by an audience of young persons," in accordance with the federal court judgment in *Interstate Circuit, Inc. v. City of Dallas*, supra, or, as United Artists urges, is the City of Dallas limited to restricting only the exhibition of those films which are "obscene," as that term has heretofore been defined by this Court?

I.

The Texas Court of Civil Appeals erred in holding that exhibition of "VIVA MARIA" may constitutionally be restricted on grounds other than obscenity.

Although recognizing the required elements of obscenity enunciated by this Court in *Roth v. United States*, 344 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 8 L. Ed 2d 639, 82 S. Ct. 1432; and, *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676, as so recently confirmed in *A Book v. Attorney General*, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975, the Texas Court of Civil Appeals held them to be totally inapplicable to the Dallas Classification Ordinance:

> "It is my firm opinion that the constitutional guaranties of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as 'not suitable for young persons' is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States

Supreme Court intended, in Near v. Minnesota, 283 U.S. 697, 716, 75 L. Ed. 1357, 1367, or in any other case, to make such a stringent limitation on the powers of a state or city in this field.

"The ordinance under examination, in defining the phrase 'not suitable for young persons,' does not employ the words 'obscene' or 'obscenity.' The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted. * * * To say that a community is powerless to protect itself and its youth from such damage because of the constitutional safeguards of free speech is to my mind unconscionable and unacceptable." (Justice Bateman's opinion, concurred in by Chief Justice Dixon, p. App. C-16, 17)

The appealing notion that freedom of expression may be inhibited to a greater degree when directed at minors rather than adults has been rejected in *Police Comm'r of Baltimore v. Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727; *Katzev v. County of Los Angeles*, 52 Calif. 2d 630, 341 P. 2d 310; *William Goldman Theatres v. Dana*, 405 Pa. 83, 173 A. 2d 59; and, *Commonwealth v. Corey*, ... Mass. ...., 221 N.E. 2d 222. Thus, the decision in this case is in conflict with the decisions of the Supreme Courts of Maryland, California, Pennsylvania, and Massachusetts when considering enactments which attempt to restrict freedom of expression as to minors.

Nor, can it be said that "VIVA MARIA" is subject to restriction if the prurient-appeal requirement is adjusted to social realities, as in *Mishkin v. State of New York*, 383 U.S.

502, 16 L. Ed. 2d 56, 86 S. Ct. 958, because this record is completely devoid of any showing that "VIVA MARIA" was primarily designed or intended for persons under the age of sixteen years.

II.

The Texas Court of Civil Appeals erred in holding classification standards of the Dallas Ordinance not to be constitutionally infirm both because of vagueness and overbreadth.

In the instant case, even if we assume that motion pictures may constitutionally be restricted to certain age groups on grounds other than obscenity, the Dallas Classification Ordinance must nonetheless be invalid.

Section 46A-1.(f) containing the standards for classification of a motion picture as "not suitable for young persons" is copied in full text on pages 8-9, supra. A motion picture may be restricted if "in the judgment of the Board [it is] likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." The definitions of incitement or encouragement are in like manner tied to the judgment of the Board, as is the determination of whether there is "a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted." The language of Justice Clark in *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 701, 3 L. Ed. 2d 1512, 1524, 79

S. Ct. 1362, is particularly appropriate to consideration of the Dallas Classification Ordinance standards:

> "* * * The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable, or profitable.' This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the belief of the individual censor rather than regulation by law."

Surely the Dallas standards of classification are no less vague than the standards stricken as unconstitutionally vague in *Gelling v. State*, 343 U.S. 960, 96 L. Ed. 1359, 72 S. Ct. 1002; *Burstyn v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *Superior Films, Inc. v. Department of Education*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286; *Commercial Pictures Corp. v. Regents*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286; and, *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870, 100 L. Ed. 770, 76 S. Ct. 117. The "precision of regulation" required in the area of First Amendment freedoms so recently emphasized in *Keyishian v. Board of Regents* (not yet officially reported) is totally lacking.

Moreover, there are so many disjunctives in the standards that exhibition of a motion picture may be restricted

for any one of 46 different grounds, all within the judgment of the Board. Standing alone, this apparent overbreadth should render the Dallas Classification Ordinance invalid. *Keyishian v. Board of Regents*, supra:

> "* * * Where statutes have an overbroad sweep, just as where vague 'the hazard of loss or substantial impairment of those precious rights may be critical, Dombrowski v. Pfister, supra, at 486, since those covered by the statute are bound to limit their behaviour to what is unquestionably safe."

Accord: *Shelton v. Tucker*, 364 U.S. 479, 488, 5 L. Ed. 2d 231, 237, 81 S. Ct. 247; *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328; and, *Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L. Ed. 2d 22, 28, 85 S. Ct. 1116.

III.

The Texas Court of Civil Appeals erred in holding that the Dallas Ordinance provides adequate procedural safeguards as to United Artists or any other distributor of motion pictures.

One may read and read again the Dallas Classification Ordinance without discovering any provision requiring the giving of any notice, or the affording of any hearing, to any distributor of motion pictures. "VIVA MARIA" was classified as "not suitable for young persons" by the Board as if United Artists did not exist, even though it was vitally interested in any audience restriction due to its participation in the box office receipts. This Court has held that persons whose legal rights would be determined by administrative or judicial proceedings are constitutionally entitled to notice thereof and an opportunity to be heard. Such notice, as has

been repeatedly emphasized, must be "reasonably calculated" to reach all interested parties. *Armstrong v. Manzo*, 380 U.S. 565, 14 L. Ed. 2d 62, 85 S. Ct. 1187; *Schroeder v. City of New York*, 371 U.S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279; and, *Mullane v. Central Hanover Bank*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652. It is no answer to such a requirement of due process to say, as did the Dallas Court of Civil Appeals:

> "* * * United Artists Corporation does not claim that it is an exhibitor of this or any other picture. It is a distributor and there is nothing in the Ordinance to prevent distribution of the film. The Ordinance has to do with the exhibition of the film to children, not its distribution. Besides, United Artists Corporation intervened in the lawsuit and was given full opportunity to be heard. It has not been harmed." (p. App. C-12)

Freedman v. Maryland, 380 U.S. 51, 58, 13 L. Ed. 2d 649, 654, 85 S. Ct. 734, requires that any prior restraint on free expression be accompanied by assuredly adequate procedural safeguards, including the requirement that,

> "* * * The burden of proving that the film is unprotected expression must rest upon the censor. * * *"

This is not the requirement of the Dallas Classification Ordinance, for once the Board has classified a motion picture the burden of challenging that classification is placed upon the exhibitor, not the Board. The exhibitor is required within two brief days of the action of the Board to file a notice of non-acceptance and any failure to timely file such a notice automatically results in the film being restricted fully to the same extent as though there had been a judicial de-

termination that the motion picture was not a protected expression. Although apparently patterned on the amended Maryland statute approved in *Trans-Lux v. Maryland*, Md. Ct. Apps., 216 A. 2d 235, it should be pointed out that such Maryland statute requires the Board of Censors to institute suit and obtain a judicial determination that a film is obscene before its exhibition may be restricted. Under the Dallas Classification Ordinance, the burden of going forward initially is placed upon the exhibitor; if he by oversight or otherwise fails to file the notice required there is restraint without judicial determination; and there is no adversary hearing or court determination before a motion picture is classified as "not suitable for young persons."

Moreover, the classification of "VIVA MARIA" as "not suitable for young persons" was required to be by mere majority vote of the Board, without any adversary hearing or determination that it was not protected expression under the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71, 9 L. Ed. 2d 584, 593, 83 S. Ct. 631; and, *A Quantity of Books v. Kansas*, 378 U.S. 205, 210, 212-13, 12 L. Ed. 2d 809, 812-13, 84 S. Ct. 1723, are direct authority that due process was denied United Artists.

IV.

The Texas Court of Civil Appeals erred in affirming the restriction of "Viva Maria" since it has some social value.

Citing *A Book v. Attorney General*, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975, Chief Justice Dixon wrote:

> "We hold that 'Viva Maria' has only a minimum of social value, if any at all, as to children under the age of sixteen years. And since it is permitted to be exhibited subject only to limited regulations, it is not constitutionally protected from the terms of the Ordinance. * * *" (p. App. C-12)

Clearly, the Court of Civil Appeals misunderstood the circumstances under which the book *Memoirs* might have been found obscene, having as it did only a minimum of social value. Justice Brennan was not saying, we respectfully submit, that because *Memoirs* had only a little social value, it might be regulated a little. Rather, he was saying that if a book, or movie, is exploited solely as appealing to prurient interests the one who so exploits it may not be sustained in contending that the work has social value rather than only the prurient appeal he urged it to have. This holding also conflicts with the requirement of *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, that only motion pictures "utterly without redeeming social importance" may be restricted.

The record before this Court, as before the Texas courts, is completely devoid of any evidence of the manner in which "VIVA MARIA" was advertised and of any evidence that it was exploited to appeal to the prurient interest of any one or any age group.

CONCLUSION

This appeal brings before this Court substantial federal questions of vital interest to municipalities and states, to

the publishing industry, to the motion picture industry and to the general public. This Court has not directly considered these federal questions and until they are resolved there will be continuing doubt, continuing restriction of expression, and continuing litigation. The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral arguments for their resolution.

Respectfully submitted,

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PROOF OF SERVICE

I, Dan McElroy, one of the attorneys for United Artists Corporation, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15 day of March, 1967, I served copies of the foregoing Jurisdictional Statement on the following parties by deposit-

ing the same in the United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee City of Dallas and Appellant Interstate Circuit, Inc. at the following post office addresses, respectively:

1. To Appellee City of Dallas:

   Mr. N. Alex Bickley, City Attorney
   Room 501, Municipal Building
   Dallas, Texas, 75201

2. To Appellant Interstate Circuit, Inc.:

   Mr. Grover Hartt
   Mr. Edwin Tobolowsky
   Tobolowsky, Hartt, Schlinger & Blalock
   Room 3525 Southland Center
   Dallas, Texas, 75201

/s/ DAN MCELROY

Dan McElroy,
1900 Mercantile Dallas Building
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An Attorney for Appellant
United Artists Corporation

APPENDIX A

Dallas City Ordinance No. 11,284

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by adding thereto a new chapter known as Chapter 46A; Providing for the establishment of a Motion Picture Classification Board; Outlining classification procedures; Defining Offenses relating to the exhibition of films classified "Not Suitable for Young Persons"; Providing for the issuance, revocation and suspension of licenses; Providing for judicial review; Defining public nuisances; Providing for injunctive relief; Providing for an exception to State law; Providing for a severability clause; Providing for a Penalty; Providing for the repeal of Ordinance No. 10963 enacted by the City Council on April 5, 1965, and enacting this ordinance in lieu thereof; and Declaring an Emergency.

WHEREAS, the City Council after investigation on the part of the members of said Council and the hearing of evidence and testimony at a public hearing called for that purpose, is of the opinion and finds that certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; and

WHEREAS, the City Council is of the opinion that legislative action should be taken by this Council for the purpose of classifying the movies to which such young persons of school age are admitted without proper supervision; and

WHEREAS, the City Council is of the opinion and finds that a great portion of said movies are available for screening and for showing more than thirty days prior to their initial exhibition and that the benefits to the public will far exceed the burden placed upon the motion picture industry by having said movies screened and classified; and

WHEREAS, the City Council is of the opinion and finds that motion picture films possess a greater capacity for good and for evil among young persons of school age than most other modes of expression and are, therefore, affected with a public interest; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and is hereby amended by adding thereto a new chapter known as Chapter 46A, consisting of Section 46A-1 through 46A-11 inclusive, which shall read as follows:

"CHAPTER 46A"

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms

§ 46A-2 Establishment of Classification Board

§ 46A-3 Classification Procedure

§ 46A-4 Offenses

§ 46A-5 License

§ 46A-6 Revocation or suspension of license

§ 46A-7 Judicial Review

§ 46A-8 Public Nuisances

§ 46A-9 Injunctions

§ 46A-10 Exception to State Law

§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their pruient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the

earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice

of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified as 'not suitable for young persons'.

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified as 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing

of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License*:

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license*:

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hear-

ing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file and order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary

injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the

application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said motion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the

trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exception to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sen-

tence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

APPENDIX B

Oral Opinion of Trial Judge A. R. Stout

THE COURT: Oh, I realize you gentlemen might be right. There are two or three features in this picture that look to me would be unsuitable to young people. Actually, they have tried to track that Friedman [sic] case, looks like, in this ordinance, and if any ordinance can be passed, why, it looks like they have taken every ground to pass one, if one can be valid, that is, valid. So I enjoin the exhibitor, its agents, servants, attorneys and employees from exhibiting it. I guess it is like a book by Mark Twain where he had a vaudeville show and was making no money, the owners of it. Then he had a man to get nude and painted him in striped paint, charged a dollar, which was unheard of in those days, limited it to men only and said, "If this doesn't get the money, I don't know Arkansas," and they did quite well. I sustain the City's position, find it okay, and enjoin them. * * *

Temporary Injunction

On this the 17th day of February A. D. 1966, came on to be heard the above entitled and numbered cause wherein the City of Dallas, as Plaintiff, seeks a temporary injunction against the Interstate Circuit, Inc., as Defendant, and United Artists Corporation, as Intervenor, have subjected itself to the jurisdiction of this Court, all parties having been represented by attorneys and in person, and having announced ready for trial, the Court proceeded to examine the pleadings, hear the testimony and the argument of counsel, and after having fully considered the same, together with the viewing

in person of the motion picture "Viva Maria", is of the opinion and hereby finds that the City of Dallas, as Plaintiff, is entitled to a temporary injunction.

It is therefore the ORDER, JUDGMENT and DECREE of this Court, and the Court hereby grants a temporary injunction against Interstate Circuit, Inc., as Defendant, and United Artists Corporation, as Intervenor, enjoining them from exhibiting said motion picture "Viva Maria" in violation of Ordinance No. 11284, or without advertising by media originating within or stationary within the City of Dallas, and exhibiting said film as "not suitable for young persons", and that this temporary injunction shall be effective pending a final hearing for a permanent injunction herein.

The Exceptions of the Defendant and Intervenor in the pleadings are hereby specifically overruled.

The Defendant in open court, requested the Court to file its Findings of Fact and Conclusions of Law and this request is specifically denied.

The Defendant and Intervenor in open court gave notice of appeal *to the Court of Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas.*

Entered this the 18th day of February A. D. 1966.

/s/ A. R. Stout

JUDGE PRESIDING

APPENDIX C

Interstate Circuit, Inc. v. City of Dallas, 402 S.W. 2d 770 (Tex. Civ. App. 1966) error ref., n.r.e.

On February 14, 1966 the City of Dallas, appellee, filed suit against Interstate Circuit, Inc., appellant, an exhibitor of commercial motion pictures, seeking temporary and permanent injunctions restraining said appellant (1) from exhibiting the film "Viva Maria" without advertising the film as "not suitable for young persons" and (2) from violating Ordinance No. 11284, as amended, by exhibiting any film contrary to the provisions of the Ordinance.

On February 16, 1966 United Artists Corporation, asserting that it is a distributor of motion pictures and is the exclusive owner of distribution rights of the film "Viva Maria", intervened in opposition to the City.

On February 18, 1966, following a hearing begun the day before, the court granted the City's prayer for a temporary injunction. The City had offered to try the case on its merits at the same time, that is, try the whole case on February 18, 1966, including the application for permanent injunction. This offer was declined by appellants.

Ordinance No. 11284 known as the "Motion Picture Classification Ordinance" was passed by the City Council of the City of Dallas on November 22, 1965. It is too long to be copied here in its entirety. A summary of its material provisions will be found in a footnote hereto.*

* The provisions of the ordinance which are material to this controversy may be summarized as follows:
Sec. 46A-1. Definition of Terms:

(d) A young person is defined as being any person who has not attained his sixteenth birthday.

The Ordinance itself has already been the subject of court action. A number of motion picture exhibitors filed suit in the United States District Court for the Northern District of Texas seeking an injunction on the ground that the Ordinance itself is violative of the First and Fourteenth Amendments to the Constitution of the United States. On December 23, 1965 Honorable Sarah T. Hughes, judge of that court, held in effect that, though Section 46A-6 of the Ordinance is unconstitutional, the rest of the Ordinance is not violative of the Constitution. Interstate Circuit, Inc. v. City of Dallas, 249 F. Supp. 19. Appended to the opinion is Appendix A—a reproduction in full of the Ordinance. The above judgment is now pending on appeal before the United States Court of Appeals.

(f) The standards to be applied in determining whether films shall be classified as "not suitable for young persons are:

"(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

"(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

"A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

In the appeal now before us Section 46A-6 is not involved. No violation of that section is alleged. The City has not undertaken to suspend appellants' license and does not seek to do so. Therefore, we shall not pass on the constitutionality of Section 46A-6, which under the terms of Section 46A-11 may be treated as severable from the rest of the Ordinance.

The two appellants have filed separate briefs. Interstate Circuit, Inc., in its first six points on appeal, and United Artists Corporation in all of its ten points, assert that the Ordinance and its application in this case are violative of the First and Fourteenth Amendments to the Constitution of the United States and of Article 1, Sections 8 and 19 of the Constitution of the State of Texas. We do not agree with appellants.

Sec. 46A-2. Establishment of Board:

This section provides for the creation of the Dallas Motion Picture Classification Board.

Sec. 46A-3. Classification Procedure:

(a) Before exhibiting a film the exhibitor shall file a proposed classification of the film together with a resume of the plot and other information. If the Board approves the exhibitor's proposed classification it shall file its approval. If the Board fails either to file an approved classification or to hold a hearing within five days, the exhibitor's proposed classification shall be considered approved.

(b) If the Board is not satisfied with the exhibitor's proposed classification, it may request an exhibition of the film before the Board at the earliest time practicable with due regard to the availability of the film. At the screening before the Board the exhibitor may appear, make such statements and present such evidence as he may desire. The Board shall file its classification within two days after such screening.

(c) Any initial or subsequent exhibitor may file an application for a change in classification. If the prior classification should be changed to "not suitable for young persons" the exhibitor shall have seven days in which to alter his advertising and audience policy.

(d) The Board shall notify all exhibitors of its classification order.

Of course Article 1, Sections 8 and 19 of the Constitution of the State of Texas does not override the Constitution of the United States. Therefore, we shall in the main confine our discussion to the latter Constitution and interpretations thereof, especially with reference to civil suits since this suit does not involve a criminal action, as did the case of Malone v. State of Texas, 339 S.W. 2d 666.

This is not a totally suppressive ordinance, or one that would totally deny the exhibition to anyone of the picture "Viva Maria" or any other classified film. It does not in any way prohibit the exhibition of any classified picture to adults. It does not even prohibit the exhibition of the picture to any child under the age of sixteen years if accompanied by parent, guardian, husband or wife. It does not prohibit exhibitors from exhibiting pictures classified "not suitable for young persons". It does not prohibit distributors from distributing a picture so classified. It is in the nature of a classification ordinance, the purpose of which is to regulate the exhibition of classified pictures to children.

By providing for such regulation the Ordinance does not contravene the freedom of speech provisions of our Constitu-

(e) The classification shall be binding on any subsequent exhibitor unless a change in classification is made.

Sec. 46A-4. Offenses:

(a) It shall be unlawful for an exhibitor (1) to exhibit a film which has not been classified; (2) and (3) to exhibit any film classified "not suitable for young persons" under sixteen years of age unless advertising and display media state that the picture is so classified; (4) and (5) knowingly to sell or give to a young person a ticket to a film classified "unsuitable for young persons", or knowingly to permit a young person to view such film.

(d) It shall be a valid defense to any prosecution or other proceeding under the Ordinance that the young person was accompanied by his parent, legal guardian, husband or wife.

tions. The Supreme Court of the United States has itself suggested that such regulation is proper. We quote from the opinion in Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material *deemed harmful to children.* But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population. . . *to reading only what is fit for children.*' Butler v. Michigan, 352 U.S. 380, 383 1 L. Ed. 2d 412, 414, 77 S. Ct. 524. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectional material to children, rather than at totally prohibiting its dissemination." (Emphasis supplied.)

See also Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 88 L. Ed. 645, and People v. Walton, 161 P.2d 498.

Sec. 46A-5. License:

Every exhibitor holding a general motion picture license shall be entitled to issuance of a license to exhibit films classified "not suitable for young persons."

Sec. 46A-6. Revocation or Suspension of License:

Upon complaint being filed that any exhibitor has repeatedly violated the provisions of the Ordinance or has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a classified film, the City Council may after notice and hearing suspend for one year the exhibitor's license for the showing of classified pictures.

Sec. 46A-7. Judicial Review:

(a) Within two days after filing of the classification by the Board, any exhibitor may file a notice of nonacceptance. If the Board desires to contest the exhibitor's nonacceptance, it shall:

(1) Make application in court within three days for a temporary and permanent injunction.

(2) Have application for temporary injunction set for hearing within five days. If the exhibitor waives notice pursuant to rules of procedure and requests a hearing on the merits on the day set for the hearing on the temporary injunction, the Board shall be

Freedom of speech, mighty bulwark that it is in the preservation of our liberties, is not an absolute right—a truth that is recognized by court decisions. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766; and Times Film Corp. v. Chicago, 365 U.S. 43, 5 L. Ed. 2d 403, 81 S. Ct. 391. We do not believe that our forefathers in adopting our constitutional provisions or that subsequent interpreters thereof intended to require of children the same discretion, the same mature judgment, or the same responsibility in sex matters that we do of adults. Freedom of speech does not include the right to teach children that sexual promiscuity is to be approved and accepted as a standard of conduct. And to so hold is not merely to embrace a contemporary local community standard as appellants contend. It involves a contemporary national standard.

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required to waive its application for temporary injunction and shall join in such request.

(3) In the event the exhibitor appeals the City shall reply to appellant's brief within five days.

(4) Same in substance as Paragraph (3) if application for writ is made to Supreme Court of Texas by exhibitor.

(5) If trial court denies the Board's application for injunction and Board appeals, Board shall be required to waive all periods of time allowed it by Texas Rules of Civil Procedure, file motion for new trial only if required and then within two days; shall not amend its motion and shall obtain a hearing within five days. Board shall perfect appeal to Court of Civil Appeals including filing of Transcript, Statement of Facts and brief within ten days and shall then file a motion requesting the Court of Civil Appeals to advance the submission of the appeal.

(6) If the Court of Civil Appeals reverses the trial court's injunction order, or if the court refuses to reverse the order, provisions are made similar to those outlined in Paragraph (5) above for the hearing of and decision by the Supreme Court of Texas.

Sec. 46A-10. Exception to State Law:

Nothing in Ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of Texas Penal Code.

Sec. 46A-11. *Severability Clause:*

Should any section of the Ordinance be held invalid such holding shall not render invalid any other section, the various sections, etc. being deemed severable for this purpose.

This Ordinance avoids constitutional infirmity though it provides for a prior submission of a film under some circumstances. Times Film Corp. v. Chicago, 365 U.S. 43, 5 L. Ed. 2d 403, 81 S. Ct. 391. The process under the terms of the Ordinance takes place under procedural safeguards which require that (1) the burden of proving that the film is not protected rests on the City; (2) the exhibitor is assured by the Ordinance and authoritative judicial construction that within a specified brief period of time the City will ether issue a permit or go to court to obtain a regulated showing of the film; (3) any restraint in advance of final adjudication must be for the shortest period of time compatible with sound judicial resolution; and (4) the procedure must assure a prompt final judicial decision. These are the tests laid down by the Supreme Court of the United States in Freedman v. Maryland, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 in a *total censorship case.*

The Texas Rules of Civil Procedure grant powers to courts to make prompt judicial decisions. In the district courts Rule 245(c) provides that actions may be placed on the trial calendar "in such other manner as the courts deem expedient" and Rule 330(b), applicable to Dallas courts, provides that "the court may set any case for trial at any time so as to allow the parties reasonable time for preparation."

In the appellate courts Rule 410, after listing certain types of cases which shall have precedence in Courts of Civil Appeals then states in Section (f): "Such other cases

as the court by order or rule, may direct." Rule 497 provides that "Causes may be tried in such order as the justices of the Supreme Court may deem to the best interest and convenience of the parties or their attorneys."

The case now before us was filed in the trial court February 14, 1966, tried February 18, 1966, submitted to this court March 28, 1966 and decided April 5, 1966. Appellants surely have no real basis to complain that the judicial procedural time table has been inadequate to meet the requirements set out in the Freedman case.

Appellants complain that the Ordinance leaves too much to the judgment and discretion of the Board. Appellants apparently overlook the fact that this case was not tried in the district court under the "substantial evidence rule", which requires a court to approve an administrative agency's decision if there is any substantial evidence to support it. This was a "*de novo*" trial in which the court was free to make and obviously did make its own independent findings regardless of the findings or judgment of the Board.

Appellants say that the Ordinance is invalid because it provides standards for the judgment which are too broad, vague, uncertain and indefinite to permit of enforcement or to give fair notice of the type of films which may be subject to classification. We see no such infirmity in the Ordinance. In Subsection (f) of Section 46A-1 the Ordinance sets definite standards for classification. Absolute precision is not required. What is required and what we think the Ordinance affords is a sufficiently definite warning of the standards

which are to guide the Board and the Courts in classifying films. As was said in Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498 (at page 1510), 77 S. Ct. 1304:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. *This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process.* '. . . The Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U.S. 1, 7, 8, 91 L. Ed. 1877, 1883, 67 S. Ct. 1538. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous. . . .'" (Emphasis ours.)

Appellants further say the Ordinance is invalid because it involves a contemporary community standard of a local community only, the City of Dallas, and not the State of Texas or the United States. Again we cannot agree with appellants. To regulate to a limited extent the portrayal to children under the age of sixteen years of sexual promiscuity as acceptable is not to apply merely a local community standard. It is to apply a contemporary national standard.

Appellants contend that to support the validity of the Ordinance or any action taken under its terms the City must prove that a film classified "not suitable for young persons"

must pass three tests. We quote from the brief of the distributor, appellant United Artists Corporation:

> "1. It must deal with sex in a manner appealing to the prurient interest, judged by the average person, applying contemporary community standards, and considering its dominant theme as a whole. Roth v. United States, 344 U.S. 476, 1 L. Ed. 2d 1498 (1957); and, 2. It must be patently offensive—so offensive on its face as to affront community standards of decency. Manual Enterprises, Inc. v. Day, 370 U.S. 478 L. Ed. 2d 639 (1962); and, 3. It must be utterly without redeeming value; hence the good may not be weighed against the bad. Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793 (1964)."

We bow to the pronouncements of the Supreme Court of the United States. But we do not believe that the holdings above set out are applicable here. In all of the cited cases the court was considering enactments which sought to impose total censorship. Their effect would have been to ban completely the sale, distribution or exhibiting of the matter involved either to adults or children. The Ordinance we have before us for consideration in this case does no such thing. As we have already pointed out it does not call for total censorship in any instance. It simply applies limited regulations of the conditions under which certain classified pictures may be exhibited to children under the age of sixteen years.

If we be in error in the above holding we nevertheless hold that the Ordinance and its application in this case do not violate the constitutional provisions. We have read the evidence reproduced in the statement of facts and viewed

the film "Viva Maria." The latter was exhibited for our benefit in the court room. The evidence amply supports the implied findings of the Board and the district court that the film offends in all of the particulars named under the three headings quoted in the foregoing excerpt from appellant's brief.

If the three tests are to be applied in this case we think test No. 1 should be modified so that in place of the words "judged by the average person" there should be substituted the words "judged by the average *young person*"—meaning a person under the age of sixteen years. However, we would make the same holding if test No. 1 were not so modified.

In the case of John Cleland's "Memoirs of a Woman of Pleasure" vs Attorney General of the Commonwealth of Massachusetts decided March 21, 1966, 34 "The United States Law Week" 4236, the Supreme Court of the United States reversed a judgment of a Massachusetts court banning the above named book. The court said, "A book cannot be proscribed unless it is found to be utterly without redeeming social value." But the court then went on to say:

> "It does not necessarily follow from this reversal that a determination that 'Memoirs' is obscene * * * would be improper under all circumstances. On the premise, which we have no occasion to assess, that 'Memoirs' has the requisite prurient appeal and is patently offensive, *but has only a minimum of social value*, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected." (Emphasis supplied.)

We hold that "Viva Maria" has only a minimum of social value, if any at all, as to children under the age of sixteen years. And since it is permitted to be exhibited subject only to limited regulations, it is not constitutionally protected from the terms of the Ordinance which the City seeks to apply or from the terms of the temporary injunction granted by the trial court.

Appellant United Artists Corporation, distributor, asserts that it has the same constitutional rights as the exhibitor, yet it is not mentioned in the Ordinance and was not notified of the hearings. There is no merit to this contention. United Artists Corporation does not claim that it is an exhibitor of this or any other picture. It is a distributor and there is nothing in the Ordinance to prevent distribution of the film. The Ordinance has to do with the exhibition of the film to children, not its distribution. Besides, United Artists Corporation intervened in the lawsuit and was given full opportunity to be heard. It has not been harmed.

We overrule the first six points on appeal of appellant Interstate Circuit, Inc. and all ten points of appellant United Artists Corporation.

In its seventh point appellant Interstate Circuit says that under Article 527 of the Texas Penal Code the State preempted to regulation of motion pictures, so that a municipality may not enter the field. In its eighth to sixteenth points, inclusive, appellant complains of the action of the court in overruling exceptions to appellee's pleadings. In its seventeenth point appellant objects to the court's failure

to set forth reasons to justify the granting of the temporary injunction. In its eighteenth and nineteenth points appellant alleges that the temporary injunction was not supported by pleadings and the court misapplied the law. We have considered all these additional points and find no merit in them. They are overruled.

Justice Bateman has written a concurring opinion in which he presents his views somewhat in detail. I have read his concurring opinion and agree with his views as stated by him.

The judgment of the trial court is
AFFIRMED.

DIXON, *Chief Justice*

Bateman, Justice (Concurring)

I concur fully with everything written by my Brother Dixon in his opinion and would like to enlarge somewhat on several of the decisions contained therein.

By its seventh point of error on appeal the appellant Interstate Circuit, Inc. says the court erred in refusing to hold that Article 527 of the Texas Penal Code pre-empted the field of regulating motion pictures, thus making invalid such attempted action by the City. The first two sections of Article 527, Penal Code of Texas, as amended in 1961, prohibit the doing of certain things, including the exhibition of obscene motion pictures, but Section 5 provides, in part, as follows:

> "The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry."

The evidence clearly shows that the film in question is what is known as a "commercial motion picture" and that it has moved, and will probably continue to move in interstate commerce. We think we can safely assume that such movements in interstate commerce will be "legal." Therefore, this motion picture, being one of a class specifically ex-

cepted from the effect of Article 527, is subject to regulation by the City.

Moreover, the City of Dallas, being a home rule city deriving its powers from Article 11, Section 5, of the Texas Constitution, has plenary charter powers which include the power to enact the ordinance here in question, its powers being subject only to the limitation that its charter and ordinances shall contain nothing inconsistent with the Texas and Federal Constitutions or the general laws enacted by the State Legislature. City of Fort Worth v. McDonald, Tex. Civ. App., 293 S.W. 2d 256, wr. ref. n.r.e.; Janus Films, Inc. v. City of Fort Worth, Tex. Civ. App., 354 S.W. 2d 597, wr. ref. n.r.e. *per curiam*, 163 Tex. 616, 358 S.W. 2d 589. Home rule cities have full authority to do anything the Legislature could have authorized them to do prior to adoption of the Home-Rule Amendment, the result being that it is not necessary to look to the acts of the Legislature for grants of power to such cities, but only for limitations on their powers. Forwood v. City of Taylor, 147 Tex. 161, 214 S.W. 2d 282, 286; Yellow Cab Transit Co. v. Tuck, Tex. Civ. App., 115 S.W. 2d 455, wr. ref.

Appellants take the position that in the light of certain pronouncements by the Supreme Court the picture "Viva Maria" is entitled to protection under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Texas Constitution unless it can

be properly said that it is obscene; and that in determining whether it is obscene three tests must be applied, to wit:

> "1: It must deal with sex in a manner appealing to the prurient interest, judged by the average person, applying contemporary community standards, and considering its dominant theme as a whole. Roth v. United States, 344 U.S. 476, 1 L. Ed. 2d 1498 (1957); and,
>
> "2. It must be patently offensive—so offensive on its face as to affront community standards of decency. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 8 L. Ed. 2d 639 (1962); and,
>
> "3. It must be utterly without redeeming value; hence, the good may not be weighed against the bad. Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793 (1964)."

It is my firm opinion that the constitutional guaranties of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as "not suitable for young persons" is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States Supreme Court intended, in Near v. Minnesota, 283 U.S. 697, 716, 75 L. Ed. 1357, 1367, or in any other case, to make such a stringent limitation on the powers of a state or city in this field.

The ordinance under examination, in defining the phrase "not suitable for young persons," does not employ the words "obscene" or "obscenity." The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not

consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted. Conveying to young persons the idea that to be able to enjoy the pleasures of sexual gratification without being burdened with any accompanying responsibility or commitment, and with no retributive consequences, or even the slightest remorse, is acceptable behavior according to accepted standards of the American community, would in my opinion have a much more pernicious effect on the morals of the community than mere obscenities. To say that a community is powerless to protect its youth from such damage because of the constitutional safeguards of free speech is to my mind unconscionable and unacceptable.

We are also asked to dissolve the temporary injunction because the order does not contain a recitation of the judge's reasons for issuing the same, as required by Rule 683, T.R.C.P. It is true that this order merely recites that all parties were represented by attorneys and in person, that they announced ready for trial and that the court, after hearing the testimony and argument of counsel, and after having fully considered the same, together with the viewing in person of the motion picture "Viva Maria", is of the opinion and finds that the appellee is entitled to a temporary injunction. The order then proceeds to grant the temporary injunction. It is also true that several Texas cases have held that this

requirement of Rule 683 is mandatory and that the omission of the reasons for granting the injunction is fatal and requires reversal. Miller v. State, Tex. Civ. App., 305 S.W. 2d 663, no wr. hist.; Northcutt v. Waren, Tex. Civ. App., 326 S.W. 2d 10, wr. ref. n.r.e.; City of Houston v. Rose, Tex. Civ. App.., 361 S.W. 2d 477, no wr. hist.

In Miller v. State, *supra*, the temporary injunction had been granted without notice to the defendant and without a hearing. There was neither pleading nor evidence that irreparable wrong, damage or injury was imminently threatened. The order did not state the reasons for its issuance. For all these reasons the order was reversed and remanded.

In Northcutt v. Waren, *supra*, there were also additional substantial grounds for reversal.

In City of Houston v. Rose, *supra*, although the failure to state the reasons for the injunction seems to have been the only ground on which the order was reversed, it was pointed out in the opinion that in several cases it had been held that the failure to set forth the reasons for granting a temporary injunction would not require a reversal "where the record affirmatively shows that no harm resulted."

It seems to be well settled by the following authorities that Rule 683 does not require a reversal when the record "affirmatively shows that no harm resulted." 31 Tex. Jur. 2d, INJUNCTIONS, § 157, p. 274; O'Daniel v. Libal, Tex. Civ.

App., 196 S.W. 2d 211, no wr. hist.; Gonzalez v. Rodriguez, Tex. Civ. App., 250 S.W. 2d 253, no wr. hist.; Rothermel v. Goodrich, Tex. Civ. App., 292 S.W. 2d 882, 884; Payton v. Hurst, etc. Clinic, Tex. Civ. App., 318 S.W. 2d 726, wr. ref. n.r.e. See also Transport Co. of Texas v. Robertson Transports, Inc., 152 Tex. 551, 261 S.W. 2d 549, and Garcia v. Sun Oil Co., Tex. Civ. App., 300 S.W. 2d 724, 735, wr. ref. n.r.e.

As pointed out in O'Daniel v. Libal, *supra*, "The purpose of the rule above referred to is to inform a party just what he is enjoined from doing and the reasons why he is so enjoined." It was also pointed out in that opinion that the application for temporary injunction was set down for hearing and that the appellant filed his answer, that both parties introduced several witnesses, some twenty witnesses testifying at the hearing, and that "the main and sole inquiry" was whether or not the act sought to be enjoined had or would result in a nuisance; that the appellant was familiar with the prayer of appellee's petition, had heard the statement of the court when he pronounced the judgment and that there could be "no doubt but what appellant knew what he was enjoined from doing and the reasons why."

With slight exception, the same may be said of the case at bar. Without further lengthening this opinion by reciting the evidence and the statements of the trial judge at the time he announced his decision in the presence of counsel

for all parties, I would simply state that this record does affirmatively show that no harm resulted from the failure of the judge to recite specifically in his order the reasons why he granted the temporary injunction. Certainly, it will not be argued that such omission probably caused the rendition of an improper judgment or probably prevented appellants from making a proper presentation of the case to this court. Rule 434, T.R.C.P.

Appellants and appellee are each asserting substantive rights under Federal law. Appellants say the film in question is protected under the United States Constitution, while appellee asserts that the exercise of its substantive right to regulate the exhibition of the film is within the bounds of that same Constitution. Yet, we are asked to reverse this case on a purely technical, procedural rule. This we are in effect prohibited from doing by the Supreme Court of the United States in Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L. Ed. 2d 889, wherein the court said that "* * * the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Rule 683, T.R.C.P., under discussion here, is purely procedural and does not involve any substantive rights of the parties. It cannot be invoked to deny the parties, appellants and appellee, of their rights under the Constitution of the United States. For this additional reason the point is overruled.

I am fully persuaded that the temporary injunction was properly granted and that it is our duty to affirm.

BATEMAN, *Associate Justice*

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT DALLAS

INTERSTATE CIRCUIT, INC,. et al.,

v.

CITY OF DALLAS

From District Court of Dallas County

Tuesday, April 5, 1966

Opinion of the Court Delivered by Mr. Dixon, Chief Justice

Mr. Williams, Associate Justice, not sitting.

Associate Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellee, City of Dallas, have and recover of and from the appellants, Interstate Circuit, Incorporated, and United Artists Corporation, and from the cash deposit in the hands of the District Clerk of Dallas County, Texas, made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

Concurring opinion delivered by Mr. Bateman,

C-22

INTERSTATE CIRCUIT, INC., et al.,

v.

CITY OF DALLAS

Monday, April 25, 1966

This day came on to be heard the motion of appellant United Artists Corporation for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

APPENDIX D

July 27, 1966

SUPREME COURT OF TEXAS

No. A-11,490

INTERSTATE CIRCUIT, INC., et al.,

v.

CITY OF DALLAS

From Dallas County, Fifth District.

Application of Interstate Circuit, Inc. and application of United Artists Corporation for writs of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the applications present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicants, Interstate Circuit, Inc., and United Artists Corporation pay all costs incurred on their respective applications.

D-2

October 19, 1966

No. A-11,490

INTERSTATE CIRCUIT, INC,. et al.,

v.

CITY OF DALLAS

From Dallas County, Fifth District.

Motions of petitioners for rehearing of their applications for writs of error having been duly considered, it is ordered that said motions be, and hereby are, overruled.

APR 14 1967

JOHN F. DAVIS, CLERK

No. 1155 64

In the

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

MOTION TO DISMISS

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No. 1155

In the

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it does not present a substantial federal question, or if the Court deems that there is a substantial federal question, Appellant's fourth question sought to be reviewed was not timely and properly raised.

JURISDICTION

This Appellant, United Artists Corporation, has presented four questions in its jurisdictional statement. No jurisdiction exists to review the decision of the Court of Civil Appeals

for the Fifth Supreme Judicial District of Texas, because none of the questions as presented by Appellant represents a substantial federal question. Additionally, the fourth question raised by Appellant was not timely and properly raised. The Dallas Motion Picture Classification Ordinance, both on its face and as applied to the Appellant, does not violate any rights guaranteed by the United States Constitution.

QUESTIONS PRESENTED

1. Whether the Dallas Motion Picture Classification Ordinance, which provides for a judicial determination prior to restraint, is in conflict with the First Amendment of the United States Constitution?

2. Whether the Dallas Motion Picture Classification Ordinance provides sufficiently definite standards for classifying motion pictures so as not to be in conflict with the First and Fourteenth Amendments of the United States Constitution?

3. Whether the procedure for a prompt final judicial determination provided by the Dallas Motion Picture Classification Ordinance is an adequate safeguard against constitutional infirmities?

4. Whether "VIVA MARIA," having been judicially determined as "not suitable for young persons" by both the trial Court and the Court of Civil Appeals, should be exhibited as such and in accordance with the Dallas Motion Picture Classification Ordinance?

STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States and the Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11,284, Appellant's Appendix A.

STATEMENT

The Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11,284 (Appellant's Appendix A Page 1), sought to be enforced in this case does not totally deny the exhibition of any motion picture to anyone. It does not prohibit the distribution of any motion picture. The Dallas Ordinance is clearly and truly a *classification* ordinance, and just as clearly and truly it is absolutely *not a censorship* ordinance. The scope of the Dallas Classification Ordinance is limited to regulating the conditions under which young people under the age of sixteen (16) years may see a motion picture which has been classified as "not suitable for young persons." If a motion picture has been so classified, it must be advertised as such, but even persons under the age of sixteen (16) may view such a motion picture if they are accompanied by their parent, guardian, husband or wife. There are no provisions in the Dallas Ordinance for totally prohibiting the exhibition or distribution of any motion picture.

This Appellant, United Artists Corporation, became a party to this litigation regarding the motion picture "VIVA MARIA" by intervention. A local Exhibitor, Interstate Cir-

cuit, Inc.,[1] had contracted with United Artists for the exhibition rights to the motion picture "VIVA MARIA." In compliance with the Dallas Motion Picture Classification Ordinance, Interstate filed a letter dated January 24, 1966, requesting the motion picture "VIVA MARIA" to be classified as "suitable for young persons." This request was considered by the Classification Board on January 25, 1966, and the Board requested a screening of this film. After viewing the film on February 7, the Board, in its open public hearing on February 9, 1966, determined the motion picture "VIVA MARIA" should be properly classified as "not suitable for young persons." Interstate was notified of the Board's action by letter dated January 9, 1966, and Interstate notified the Board of its non-acceptance of the Board's classification and its intention to exhibit said film contrary thereto by letter dated February 11, 1966. As required by this classification ordinance, on February 14, 1966, within three (3) days of the Exhibitor's notice of non-acceptance, the City of Dallas petitioned the Dallas District Court for a temporary and permanent injunction to enjoin Interstate from exhibiting and advertising the motion picture "VIVA MARIA" without classifying it as "not suitable for young person," and seeking a judicial determination as to whether or not said motion picture was in fact "not suitable for young persons." The case was set for a hearing on February 17, 1966, and the City of Dallas offered to have it heard on either a temporary or a permanent injunction. The Exhibitor, Interstate, and the Distributor, Appellant herein,

[1] Interstate Circuit, Inc., has also filed an appeal in this case, Cause No. 1109, *Interstate Circuit, Inc. v. City of Dallas* filed March 3, 1967.

refused the offer to have the case heard on a permanent injunction. This case was tried as a trial de novo and not as an appeal from an Administrative Order or Decision. The City of Dallas carried the burden of proving that the motion picture was "not suitable for young persons." Both United Artists Corporation and Interstate Circuit, Inc., filed answers and were represented in the trial of the case. After hearing the evidence and viewing the entire film, the trial Court found that the motion picture "VIVA MARIA" was in fact "not suitable for young person," and entered its judgment on February 18, 1966, enjoining both defendants from exhibiting or advertising the film contrary to that finding within the city limits of the City of Dallas.

This Appellant and Interstate both appealed the trial Court's decision in this case to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and after the submission of briefs by all parties, the Appellate Court viewed the entire film, heard oral arguments, and rendered its judgment and written opinion on April 5, 1966, *Interstate Circuit, Inc., et al. v. City of Dallas*, 402 S.W. 2d 770, writ of error refused, no reversible error. It is from this judgment and opinion by the Court of Civil Appeals that this Appellant is appealing.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

I.

The Texas Court of Civil Appeals did not err in holding that "VIVA MARIA" should be exhibited under the classification of "not suitable for young persons."

Appellant admits that the Court of Civil Appeals recognized the required elements of obscenity enunciated by this Court in *Roth v. United States*, 354 U.S. 476; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Jacobellis v. Ohio*, 378 U.S. 184; *A Book v. Attorney General*, 383 U.S. 413. However, this Appellant fails to point out that the Court of Civil Appeals also recognized the distinction between those *censorship* cases and this *classification* case. The distinction is all important.

As this Court pointed out in the *Jacobellis* case, *supra*, the very question of *obscenity* becomes a constitutional question because if the material is obscene, it is not constitutionally protected. If it is obscene, it can be totally suppressed. The Dallas Ordinance does not deal with total suppression of any material under any circumstances. The Dallas Classification Ordinance simply provides that if certain motion pictures are found to be "not suitable for young persons," they shall be exhibited and advertised as such. The "restriction" that Appellant speaks of, amounts to requiring young persons fifteen (15) years old and under to be accompanied by their parent, guardian, husband or wife when viewing a motion picture so classified. Section 46A-4(d) of the Dallas Ordinance (Appellant's Appendix A, Page 9) provides that a young person may view a motion picture classified as "not suitable for young persons" if so accompanied.

Since the Dallas Motion Picture Classification Ordinance is not a censorship ordinance, which would totally prohibit the exhibition of motion pictures, it does not attempt to determine whether or not a motion picture is obscene. In

drafting this Classification Ordinance, the City of Dallas has attempted to follow the language and decisions of this Court. This Court pointed the way for the enactment of the Dallas Motion Picture Classification Ordinance in the *Jacobellis* case, *supra*, at page 195:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children.' Butler v. Michigan, 352 U.S. 380, 383, 1 L. Ed. 2d 412, 414, 77 S. Ct. 524. *State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectional material to children, rather than at totally prohibiting its dissemination.*" (Emphasis ours).

This Court pointed out that liberty of speech was not an absolute right with no limitations whatever in *Kingsley Books v. Brown*, 354 U.S. 436, and again in *Times Film Corporation v. Chicago*, 365 U.S. 43, 49, this Court stated:

> "Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. * * * To this argument petitioner's only answer is that regardless of the capacity for, or extent, of such an evil, previous restraint cannot be justified. With this we cannot agree. We recognized in Burstyn, 343 U.S 495, 96 L. ed. 1098, 72 S. Ct. 777, supra, that 'capacity for evil * * * may be relevant in determining the permissible scope of community control,' at page 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. Each method,' we said, 'tends to present its own particular problems.' At page 503."

In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, this Court held that the State has an interest in the welfare of children and that even the family itself is not beyond regulation in the public interest. This Court pointed out in *Bantam Books v. Sullivan*, 372 U.S. 58, 70, that a system of prior restraint would be tolerated if conditions of proper "judicial superintendence" and "and almost immediate judicial determination of the validity of the restraint" were met, and these conditions have been met by the Dallas Ordinance.

II.

The Texas Court of Civil Appeals did not err in holding that the Dallas Motion Picture Classification Ordinance provides sufficiently definite standards for classification of motion pictures so as to avoid constitutional infirmities.

This Court has not required impossible standards even in obscenity cases, which deal with the total prohibition of the dissemination of the material in question, but only that there be sufficiently definite warnings measured by common understanding and practices, *United States v. Petrillo*, 332 U.S. 1, and *Roth v. United States*, supra. Again in *Beauharnais v. Illinois*, 343 U.S. 250, 264, this Court held that the law was not so "ill defined" that men acting under a statute and Judges and juries in applying it could not draw from it adequate standards to guide them. This same reasoning was

used by this Court in *American Communications Association v. Douds*, 339 U.S. 382, 412, when this Court stated:

> "* * * The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

This Court had earlier stated in *United States v. Petrillo*, supra, at page 7:

> "* * * ; but the constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices. The Constitution requires no more."

The City of Dallas has aimed its legislation at young persons under the age of sixteen (16), and has drafted its standards for classification in accordance with the decisions of this Court.

Appellant's first two questions herein deal primarily with the standards for classifying motion pictures. In this regard, Appellant makes reference to the case of *Interstate Circuit, Inc., et al., v. City of Dallas*, 249 Fed. Supp. 19 (Northern District of Texas), which was affirmed by the United States Court of Appeals for the Fifth Circuit in *Interstate Circuit, Inc., et al. v. City of Dallas*, 366 F. 2d 590. Both cases held that the Dallas Motion Picture Classification Ordinance was constitutional, but limited the standard for classifying films to those that were obscene when viewed by an audience of young people. The lower Federal Courts did recognize the doctrine of variable obscenity;

however, the City of Dallas has filed a Petition for Writ of Certiorari, *City of Dallas v. Interstate Circuit, Inc., et al.*, Cause No. 978, requesting this Court to sustain the classification standards as set forth in the Dallas Ordinance.[2] If there be a substantial federal question as to the validity of the classification standards of the Dallas Motion Picture Classification Ordinance, that question could be properly resolved by granting the Writ of Certiorari already pending before this Court.

III.

The Texas Court of Civil Appeals did not err in holding that the Dallas Ordinance provides adequate procedural safeguards.

Appellant, United Artists Corporation, urges that since the Dallas Classification Ordinance does not provide for notice to the Distributor of motion pictures, the procedures as provided by the Ordinance are inadequate. Appellant does not assert that it did not have actual notice, but merely attempts to claim that it did not have technical notice. Notwithstanding the fact that the Dallas Ordinance is aimed at the exhibition of motion pictures and in no way speaks to the distribution of any motion picture, all of the meetings and hearings of the Dallas Motion Picture Classification Board are open public hearings and the Board's actions, concerning any motion picture, are distributed to all the

[2] Interstate Circuit, Inc. et al., a number of motion picture Exhibitors in Dallas and parties to the above referenced case decided by the United States Court of Appeals for the Fifth Circuit, also filed a Petition for Writ of Certiorari in a proceeding styled *Interstate Circuit, Inc., et al. v. City of Dallas,* Cause No. 971.

exhibitors, the local press, and any other party requesting such information.

The Distributors of motion pictures, including this Appellant, do just what the term implies—distribute motion pictures; they do not exhibit motion pictures. The Distributor, as in the present case, contracts with a local Exhibitor for the exhibition of a motion picture. Although, as a matter of practice, the Distributors of motion pictures in Dallas are kept abreast of the Classification Board's actions by their contracting partners, the Exhibitors, any Distributor may receive notice of any of the Board's actions by simply requesting it, and many have so done. Any Distributor may appear at any Board meeting or hearing and present whatever evidence and testimony it may desire.

It is abundantly clear that if the Distributor does not feel that notice to its contracting partner, the Exhibitor, is sufficient, it may rectify the situation by request.

Of course, as pointed out above, this Distributor does not contend that it received no actual notice in this case; to the contrary, since United Artists Corporation is a party to this case, it is obvious that it had notice of the Board's action concerning "VIVA MARIA."

The Dallas Motion Picture Classification Ordinance, both on its face and as applied in this case complies with the requirements as set forth by this Court in *Freedman v. State of Maryland*, 380 U.S. 51. Although the *Freedman* case dealt with the complete prohibition of the exhibition of a motion picture under the Maryland *Censorship* Statute,

as opposed to the *classification* of motion pictures under the Dallas Ordinance, the record in this case clearly reveals that a prompt judicial review was afforded the interested parties. After being notified that the Exhibitor, Interstate Circuit, Inc., did not accept the Board's classification and did not intend to comply with same, the City of Dallas, as required by the Classification Ordinance, went forward and, within one week, had a judicial determination as to whether the motion picture "VIVA MARIA" was in fact "not suitable for young persons." The City of Dallas carried the burden of proof.

Section 46A-7 of the Dallas Motion Picture Classification Ordinance, entitled "Judicial Review" (Appellant's Appendix A, Page 11), sets forth the provisions for a prompt judicial review and determination. The City of Dallas *must* comply with these provisions in order to enforce the Ordinance. The Ordinance itself provides that unless this strict timetable is complied with, the Board's classification is *suspended* (Section 46A-7(b), Appellant's Appendix A, Page 14). Either the Exhibitor gets its speedy judicial review, or it may exhibit the film without classification.

The Dallas Ordinance not only provides for a prompt judicial determination as to whether or not the motion picture is properly classified; but, in addition, the Ordinance demands that the City of Dallas cooperate with the Exhibitor in its effort to obtain a speedy appeal, if requested to do so.

Most of the cases cited by Appellant deal with *censorship legislation* and a *total suppression* of the subject matter, as

opposed to the Dallas Ordinance, which does not attempt to tamper with anyone's work product, nor his right to speak or make a motion picture, but only to classify adult entertainment as such.

Appellant's contention that the burden of challenging a classification by the Board is placed upon the Exhibitor is completely untenable. This "tremendous burden" to which Appellant makes reference is simply the requirement that the Exhibitor notify the Board that it disagrees with the Board's classification. This notice entails *no burden of proof.* If a "judicial determination" is desired, a simple notice of disagreement commands the City of Dallas to provide it. It is mandatory that the City of Dallas obtain a speedy judicial determination to prove that the motion picture in question is "not suitable for young persons." The burden of proof is squarely on the City. Is Appellant seriously contending that there should be a judicial determination on every motion picture, even when there is no disagreement?

IV.

The Texas Court of Civil Appeals did not err in affirming the decision that "VIVA MARIA" was "not suitable for young persons" and should be exhibited as such.

Appellant has misconstrued what Chief Justice Dixon was saying in his written opinion in this case. Chief Justice Dixon in citing *A Book v. Attorney General, supra,* was not attempting to apply strictly the language of that case decided

by this Court to the "VIVA MARIA" case. He certainly recognized that the "FANNY HILL" case was an obscenity case dealing with the total prohibition of the dissemination of the material.

Chief Justice Dixon did rely on the language in that case to mean that further circumstances may offset a minimum of social value if the other requisites of the obscenity test are met. He then concluded that "VIVA MARIA" should be classified as "not suitable for young persons" under the terms of the Dallas Classification Ordinance, since the Dallas Ordinance provides requirements quite different from those of censorship laws, which normally provide for the total prohibition or complete suppression of the matrial. Chief Justice Dixon did not say that "VIVA MARIA" should not be constitutionally protected under the obscenity test, but he did say that the provisions of the Dallas Classification Ordinance as applied to this motion picture did not violate constitutional rights. The "minimum of social value, if *any at all*," as mentioned by Chief Justice Dixon, should be considered in its proper perspective, that is, with relation to the classification of motion pictures as provided under the Dallas Ordinance, rather than with relation to the obscenity test under censorship cases.

APPELLANT'S FOURTH QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY AND PROPERLY RAISED

No jurisdiction exists to review the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District

of Texas with regards to Appellant's fourth question dealing with whether or not "VIVA MARIA" had some social value. This Appellant asserts that the Texas Court of Civil Appeals committed error in its interpretation of *A Book v. Attorney General, supra,* and quotes from the opinion of Chief Justice Dixon at the top of page 23 of its Jurisdictional Statement.

Notwithstanding this language by the Texas Court of Civil Appeals, Appellant failed to properly assign this as error in its Motion for Rehearing to the Court of Civil Appeals. The Texas Rules of Civil Procedure require proper assignment of error in the Motion for Rehearing in the Court of Civil Appeals as a prerequisite to appeal to the Supreme Court of Texas by Application for Writ of Error. Texas Rules of Civil Procedure, Rule 469(c).[3]

[3] Texas Rules of Civil Procedure—Rule 469
Requisites of Application for Writ of Error.

"The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect, in order to reduce the work of the Court. The respondent is urged to file a reply.

"The application for writ of error shall be addressed to 'The Supreme Court of Texas,' and shall state the name of the party or parties applying for the writ. The parties shall be designated as 'Petitioner' and 'Respondent'. The application shall contain the following:

* * *

"(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court."

In its Application for Writ of Error submitted to the Supreme Court of Texas, Appellant again failed to assign error to that portion of the Court of Civil Appeals' Opinion of which it is now complaining. Thus, the Appellant has failed to properly perfect its appeal under the Texas Rules of Civil Procedure, *Moore v. Dilworth*, 179 S.W. 2d 940; *East Texas Motor Freight Lines v. Loftis*, 223 S.W. 2d 613.

Not only is Appellant required to timely assert the federal question, but it is also required to pursue it throughout the litigation in all steps of appeal. It is not proper to present it to the Highest State Court for the first time on a Petition for Rehearing. *Hanson v. Denckla*, 357 U.S. 235; *Herndon v. Georgia*, 295 U.S. 441; *American Surety Co. v. Baldwin*, 287 U.S. 156; *Forbes v. State Council*, 216 U.S. 396; *Simmerman v. Nebraska*, 116 U.S. 54.

CONCLUSION

The decision of the Texas Court of Appeals as set forth in Appendix C, Pages C-1 through C-21, of Appellant's Jurisdictional Statement, which was in effect affirmed by the Supreme Court of Texas by that Court's denial of Appellant's Application for Writ of Error, is in all respects correct, and upon that opinion and for the foregoing reasons, Appellant's appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Motion to Dismiss has been served upon Mr. Dan McElroy and Mr. Paul Carrington, attorneys for Appellant-Intervenor, United Artists Corporation, by delivering the same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas, and Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them at their offices located at 3525 Southland Center, Dallas, Texas.

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SUPREME COURT, U.S.

MAY 3 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1155~~ 64

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from
The Fifth Supreme Judicial District of Texas

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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WARLICK PRESS, INC.—P. O. BOX 10543—2263 VALDINA STREET—DALLAS—ME 1-3130

In the

Supreme Court of the United States

OCTOBER TERM 1966

No. 1155

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from
The Fifth Supreme Judicial District of Texas

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellant United Artists Corporation submits this brief in opposition to Appellee City of Dallas' Motion to Dismiss the above styled and numbered appeal and would respectfully show the following:

I.

The first question raised in United Artists' Jurisdictional Statement presents a substantial federal question concerning the First Amendment to the United States Constitution.

Appellee's Ordinance No. 11,284 undeniably authorizes restraint on speech, something which this Court has repeated-

ly held cannot be justified except under the most exigent circumstances. See, e.g., *Herndon v. Lowry*, 301 U.S. 242, 258.

The City of Dallas argues that there is no substantial federal question to be decided by this Court since the Dallas Ordinance is a classification rather than a censorship ordinance. The argument is that because there is no total suppression of speech, constitutional considerations are not involved. It seeks support for this position from dicta found in Justice Brennan's opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 195. The City argues that the language in the *Jacobellis* case is sufficient to validate the overall scheme erected by Ordinance 11,284, the substantive and procedural provisions of the Ordinance, and their application to the motion picture VIVA MARIA. In other words, because of the language in *Jacobellis*, the City of Dallas believes it has *carte blanche* to restrict and abrogate the First Amendment rights of minors, United Artists and other distributors. There is no support for this position either in the *Jacobellis* dicta quoted in Appellee's Motion to Dismiss or in any case cited by Appellee.

To the contrary, every Court, in considering ordinances or statutes which do not totally suppress speech but restrain it only partially, has recognized the inherent application of the Constitution to any consideration of the questioned enactment. Indeed, the Court of Appeals for the Fifth Circuit, in considering this very Dallas Ordinance, assumed the First Amendment protections to be applicable. 366 F. 2d 590, 597, 599.

Similarly, state courts, in considering the so-called "crime comic book" statutes, have consistently applied the First Amendment, even though the ordinances did not totally suppress material. (See *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310 (1959); *Adams v. Hinkle*, 51 Wash. 2d 763, 322 P. 2d 844 (1958); *Police Commissioner of Baltimore v. Siegel Enterprises*, 223 Md. 110, 162 A. 2d 727 (1960) cert. denied, 364 U.S. 909; *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 201 N.E. 2d 14, 252 N.Y.S. 2d 433 (1964); *People v. Kahan*, 14 N.Y. 2d 311, 206 N.E. 2d 333, 258 N.Y.S. 2d 391 (1965)).

Appellee's reliance on *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, is likewise misplaced. Unlike the case at bar, *Prince* arose under the "free exercise" clause of the First Amendment and involved regulation of *conduct*, not speech. This Court has long recognized that the state's permissible range of regulation over conduct, even though speech may be affected indirectly, is much broader than its constitutionally permissible range of direct regulation over pure speech. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554-555. The Dallas Ordinance, by contrast, involves a direct regulation of speech.

II.

The third question raised in United Artists' Jurisdictional Statement presents a substantial federal question concerning the First and Fourteenth Amendments to the United States Constitution.

The City of Dallas, in its Motion to Dismiss, has misconstrued Appellant's argument that the Dallas Ordinance

does not provide adequate procedural safeguards as to United Artists and other distributors. The threshold question is not whether United Artists or any other distributor is aware of or has knowledge of the classification, but whether the classification can become binding as to distributors' pictures without judicial participation, as required by *Freedman v. Maryland*, 380 U.S. 51, 58, 59.

Under Section 46A.-7. (a) and (c) (p. App. A-11, A-14) an administrative classification becomes operative unless a notice of non-acceptance is filed by "any exhibitor". The distributor of the film neither receives notice of the classification nor is it permitted to file a notice of non-acceptance. Protection of a distributor's constitutional right to have its films freely exhibited cannot be delegated to an exhibitor or exhibitors, who for their own reasons may sometimes be unwilling to contest the Board's classifications. Appellee's attempt to distinguish between "distribution" and "exhibition" is fatuous. The federal courts have long recognized that a motion picture distributor has a constitutional right to have its films exhibited. See, e.g., *Corsican Productions v. Pitchess*, 338 F. 2d 441 (9th Cir. 1964).

Contrary to the City's assumption, the failure to file a notice of non-acceptance does not in any way imply "no disagreement" with the Board's proposed classification. It may indicate that in the Board's war of attrition with exhibitors, sheer human inertia will result in some unwilling acquiescence in a classification by the Board. This is the constitutional evil that *Freedman* was designed to correct.

If such a provision were deemed constitutionally permissible, the result would be far reaching. Could, for example, a Commission be established which would determine which books could not be sold to minors and, unless the bookseller or distributor filed with the Commission, within two days, a "non-acceptance" of the designation, the designation by the Commission be made automatically into a prohibition that books so designated could not be sold to minors? The enforcement of administrative designations without judicial participation has never been sanctioned by this Court. (*Bantam Books v. Sullivan*, 372 U.S. 58)

Additionally, although Appellee has gone far outside the record to state that United Artists obtained knowledge of the Board's classification of VIVA MARIA, it has not attempted to answer and it cannot challenge our conclusions that there is no provision in the Ordinance requiring that any notice be given to any distributor that exhibition of its motion picture is to be restricted, and there is a provision for that restriction in the absence of a "non-acceptance" by "any exhibitor."

III.

The fourth question raised in United Artists' Jurisdictional Statement was timely and properly raised and preserved in the courts below.

On pages 15 and 16 of its Motion to Dismiss, Appellee correctly states the Texas law—but in a vacuum—as to the

procedure required to preserve a point of error for presentation to the Supreme Court of Texas. However, the cases cited by Appellee have no application to the case at bar. The combined record in this appeal and in No. 1109 demonstrates that United Artists has contended throughout this litigation in the state courts of Texas that VIVA MARIA had been restricted even though there was no evidence that the motion picture was obscene as that term had been defined by this Court. Of course, no motion picture having any social value could be obscene under such a definition.

The Fourth question presented in United Artists' Jurisdictional Statement was clearly raised and preserved in the courts below, as follows: Point of Error Four in its Motion for Rehearing in the Court of Civil Appeals; Point of Error Two in its Application for Writ of Error to the Texas Supreme Court; Point of Error Two in its Motion for Rehearing in the Texas Supreme Court; and, Point of Error Four in its Supplemental Motion for Rehearing in the Texas Supreme Court.

IV.

The second and fourth questions in United Artists' Jurisdictional Statement have not been seriously challenged in substance.

United Artists sees no necessity of adding to its prior statements in connection therewith.

CONCLUSION

The four questions presented in United Artists' Jurisdictional Statement do raise substantial federal questions, all of which are now properly before this Court and warrant its plenary consideration.

Respectfully submitted,

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PROOF OF SERVICE

I, Dan McElroy, one of the attorneys for United Artists Corporation, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of May, 1967, I served copies of the foregoing Brief in Opposition to Motion to Dismiss on the following parties by depositing the same in the United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee City of Dallas and Appellant Interstate Circuit, Inc. at the following post office addresses, respectively:

1. To Appellee City of Dallas:

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2. To Appellant Interstate Circuit, Inc.:

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SUPREME COURT, U. S.

OCT. 2 1967

JOHN F. DAVIS, CLERK

No. 64

In the

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal From the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR THE APPELLANT

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On Appeal From the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The oral opinion of the trial court (R. 116-117) is not officially reported, nor are the two concurring opinions of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. (R. 161-177) The appellate opinions are reported unofficially at 402 S.W. 2d 770 (Tex. Civ. App. 1966). In denying the Application for Writ of Error, no

reversible error (R. 182), the Supreme Court of Texas announced no opinion.

JURISDICTION

Following the entry of judgment in the Court of Civil Appeals on April 5, 1966 (R. 178), Appellant United Artists Corporation (hereinafter referred to as "United Artists") filed a Motion for Rehearing, which was denied on April 25, 1966. (R. 179-180) United Artists' Application for Writ of Error to the Supreme Court of Texas was filed on May 19, 1966, and denied on July 27, 1966. (R. 182) United Artists next filed a Motion for Rehearing and then a Supplemental Motion for Rehearing, both of which were denied by the Supreme Court of Texas on October 19, 1966. (R. 188) From such denial, no further review was available to United Artists in the state courts of Texas and, accordingly, its Notice of Appeal to this Court was filed in the Court of Civil Appeals on January 16, 1967. (R. 192-194) United Artists filed its Jurisdictional Statement herein on March 16, 1967, and probable jurisdiction was noted on May 15, 1967. (387 U.S. 903)

Jurisdiction of this Court is founded on 28 U.S.C. 1257(2).

LEGISLATION AND CONSTITUTIONAL PROVISIONS INVOLVED

Ordinance No. 11284, enacted by the City Council of the City of Dallas on November 22, 1965, is challenged herein on its face and as applied to restrain exhibition of the motion picture "VIVA MARIA" on the grounds that both the ordinance and its application in this case are repugnant

to the First Amendment to the United States Constitution and to Section 1 of the Fourteenth Amendment thereto. The text of the ordinance is set forth in full in an Appendix hereto (App. A, *infra.*). Pursuant to Ordinance No. 11284, Appellee City of Dallas created a Motion Picture Classification Board which classifies all motion pictures before their exhibition as either "suitable for young persons" or "not suitable for young persons."[1]

RELEVANT PROVISIONS

Section 46A-1. *Definition of Terms:*

* * *

(d) 'Young person' means any person who has not attained his sixteenth birthday.

* * *

(f) 'Not suitable for young persons' means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in

---

1. An earlier Dallas classification ordinance, No. 10963, was held unconstitutional by the United States District Court for the Northern District of Texas. *Interstate Circuit, Inc. v. City of Dallas,* 247 F. Supp. 906 (November 9, 1965). The present ordinance, No. 11284, was passed immediately thereafter.

In addition to this appeal and No. 56 on the Court's current docket, in which Interstate Circuit, Inc. is appellant, both involving application of Ordinance No. 11284 to the motion picture "VIVA MARIA" by state courts, the ordinance has also been attacked in a Federal suit seeking declaratory and injunctive relief. The United States District Court for the Northern District of Texas and the Court of Appeals for the Fifth Circuit both held that the ordinance was invalid in part and valid in part. *Interstate Circuit, Inc. v. City of Dallas,* 249 F. Supp. 19 (December 23, 1965); aff'd, 366 F. 2d 590 (August 30, 1966). However, no injunction issued to prohibit the City from enforcing those portions of the ordinance which were held invalid. The Federal suit is the subject of two petitions for certiorari pending before this Court. *Interstate Circuit, Inc. v. City of Dallas* (No. 42); *City of Dallas v. Interstate Circuit, Inc.* (No. 44).

the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity[2] or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

* * * * *

Section 46A-3. Classification Procedure:

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited,

2. Ordinance No. 11401, enacted by the City Council of the City of Dallas on March 21, 1966, added to Section 46A-1 the following provision, which is not involved in the instant appeal:

"(n) The term 'sexual promiscuity' as used in this Chapter shall mean indiscriminate sexual intimacies beyond the customary limits of candor in the community, and said term as defined herein shall include, but not be limited to sexual intercourse as that term is defined."

stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered,

and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4, *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

* * *

(c) It shall be unlawful for any person:

(1) To sell or give to any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

* * *

Section 46A-7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhib-

iting the film in question contrary to the provisions of this ordinance.

* * *

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) [sic] of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

QUESTIONS PRESENTED

I.

Whether the Dallas Classification Ordinance is void on its face because it authorizes the restraint of motion pictures on constitutionally impermissible grounds.

II.

Whether the Dallas Classification Ordinance as applied imposed an unconstitutional restraint on exhibition of the motion picture "Viva Maria."

III.

Whether the Dallas Classification Ordinance is void on its face for failure to provide the procedural safeguards required by the First and Fourteenth Amendments to the United States Constitution and by prior decisions of this Court.

STATEMENT

United Artists, a national distributor of motion pictures, owns the exclusive domestic distribution rights to the feature motion picture "VIVA MARIA," a large-budgeted, French-language, comedy-adventure film with English subtitles.[3] The film stars Brigitte Bardot, Jeanne Moreau and George Hamilton, was directed by Louis Malle, and has a music score by the internationally renowned composer Georges Delerue.

"VIVA MARIA" had its American premiere in New York City on December 18, 1963. Bosley Crowther, film critic for *The New York Times*, described the movie as "light-hearted fun" and likened the "wild adventures" of its two heroines to those of Bob Hope and Bing Crosby in their numerous "Road to . . ." films. (R. 151) Wanda Hale of *The New York Daily News* gave the film her newspaper's highest rating, and described it in the following manner:

> "With Gallic humor and Hollywood know-how, obtained from keen observation, Louis Malle has made le western fou—meaning a mad, zany, crazy western. Viva Maria is its name, co-starring Brigitte Bardot and Jean [sic] Moreau as a song and dance team with a travelling circus who become leaders in a Central-American revolution.
>
> "Leave your incredulity at home before going to either the Astor or the Plaza Theatre to see this outrageously funny spoof on our outdoor action films. English titles are helpful if you don't understand the

3. The film also was distributed in various parts of the United States in a visually identical version but with dubbed-in English dialogue. The dubbed version was never exhibited within the City of Dallas.

French language but the action speaks for itself, eloquently. As the French love our westerns, M. Malle will most likely win the legion d'honneur for outdoing Hollywood at its own game.

"Malle photographed his petticoat western in Mexico, Panavision, Eastmancolor, a first for a French director. Stunning scenic backgrounds may get the cameraman a French prize. In the vast undertaking, Malle keeps the story by Jean-Claude Carriere and himself well under control. Every sequence reflects a lively, vivid imagination in this, his first attempt to make a comedy of epic proportions.

"As for the stars, Bardot the sex kitten, and Moreau, fine dramatic actress, are both delightful in comedy roles. Moreau is more sedate in her performance but neither overdoes it. Brigitte proves that she is an accomplished comedienne with clothes on. Except for their strip-tease act together, both are fully clothed in dresses of the period, early 20th Century. Both girls are named Maria, which adds to the confusion of most characters and the merriment of the film.

"Maria I (Moreau) and Maria II (Bardot) are forced into the shootingest revolution in film history by one Flores, played by George Hamilton, who's a failure as an insurrectionist.

"On his deathbed, Flores makes a request, pleading with the woman he loves, Maria I, to carry on the fight against the rich, brutal despots of San Miguel. Giving her promise, Maria I rallies the lethargic peons into a wildly enthusiastic fighting force.

"Teaching peasants the art of guerilla warfare is Maria II, who has learned revolutionary tactics from her Irish father, an anarchist who was chased out of both Ireland and England and who was killed in Central America.

"An expert with dynamite, guns and small cannon, she leads the rebels in actual warfare. No wonder that the tyrants are wiped out to the last man!

"The stars, George Hamilton, and a few French players are assisted by Mexican actors of note and thousands, it seems, of extras. Malle has directed his actors and action with tongue in cheek, a genius for comic invention, an exaggeration of what he has seen in American westerns and a little bit of Ian Fleming thrown in.

"Where does he go from here? Not, I hope, to conceal his marvelous sense of humor in those way-out dramas of sordid life. Even if he hasn't directed a masterpiece, Louis Malle has made a fun picture that anybody with a broad sense of humor can enjoy to the fullest." (R. 152)

The Classification Board

Although Ordinance No. 11284 was enacted by the City Council of the City of Dallas on November 22, 1965, the City did not immediately begin to enforce it because of a suit in the United States for the Northern District of Texas attacking its constitutionality. On December 20, 1965, that Court issued a judgment in which the ordinance was held valid in part and invalid in part.[4] The District Court also stayed enforcement of the ordinance for 30 days from the date of its judgment, but did not issue an injunction prohibiting the City from thereafter enforcing those provisions of the ordinance found to be invalid. Upon expiration of the order staying enforcement of the ordinance, the Motion

4. The District Court's Findings of Fact and Conclusions of Law were not issued until December 23, 1965. 249 F. Supp. 19; aff'd, 366 F. 2d 590 (5th Cir. 1966). The Federal suit is the subject of two petitions for certiorari pending in this Court. See n. 1, *supra*.

Picture Classification Board created pursuant thereto commenced operating.

On January 17, 1966, United Artists licensed "VIVA MARIA" to Interstate Circuit, Inc. (hereinafter referred to as "Interstate") for a run of four to six weeks at the Esquire Theatre, a commercial motion picture theatre within the city limits of the City of Dallas. The license agreement provided that United Artists would receive 25% to 60% of the receipts derived from exhibition of the film, depending on its box-office gross. (I. Ex. 1; R. 101, 146-147)

As required by the ordinance, Interstate on January 24, 1966, filed its proposed classification (P. Ex. 3; R. 38, 135-136)—"suitable for young persons"—and at the same time furnished the Motion Picture Classification Board with a *Motion Picture Herald* review in which "VIVA MARIA" was described as "one of the funniest and most imaginative motion pictures to appear on the screen in a very long time." (P. Ex. 8; R. 38, 136)

At the Board's request, a print of the film was made available for screening. On February 9, 1966, the Board classified "VIVA MARIA" as "unsuitable [sic] for young persons" (R. 138), even though only five of the eight Board members who voted in favor of the classification had actually seen the film. (R. 60, 70) Neither the minutes of the Board (P. Ex. 4; R. 38, 137-139) nor the notice of classification to Interstate (P. Ex. 5; R. 39, 140-141) specified or gave any indication of the ground or grounds upon which the Board

had classified the motion picture, although there are 46 separate and distinct grounds in the ordinance upon which the Board may base a "not suitable" classification. (App. B, *infra.*)[5]

The effect of the "not suitable" classification was to exclude persons under the age of 16 years from viewing "VIVA MARIA" and to require that all advertisements for the film carry the legend "not suitable for young persons." (Section 46A-4(a) (2, 4, 5); R. 125-126)[6]

On February 11, 1966, Interstate filed a "notice of non-acceptance" of the Board's classification (P. Ex. 6; R. 40, 142), stating its intention to exhibit "VIVA MARIA" as "suitable for young persons." If Interstate had not filed such notice within two days of the entry of the Board's classification order, that order would have become final without any judicial determination that exhibition of "VIVA MARIA" could properly be restrained as "not suitable for young persons." (Section 46A-7(c); R. 131)

5. In the Federal suit previously referred to, both the District Court and the Court of Appeals for the Fifth Circuit held that the ordinance would be valid only insofar as applied to classify motion pictures which would be "obscene when viewed by an audience of young persons." 249 F. Supp. at 24; 366 F. 2d at 598-599. However, neither of those courts issued an injunction prohibiting the Board from applying the standards of the ordinance as written.

6. However, if a person under the age of 16 years were to be prosecuted for *entering, purchasing* a ticket to or *viewing* a motion picture classified as "not suitable for young persons," a valid defense would be established if it were shown that such "young person" "was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film." (Section 46A-4(d); R. 127)

It is unclear from the terms of the ordinance whether such a defense would be available to an exhibitor who is prosecuted for *selling* or *giving* to a "young person" a ticket to any film classified as "not suitable for young persons." (See Section 46A-4(a)(4); R. 126)

The Trial Court

On February 14, 1966, three days before the film was scheduled to have its initial exhibition within the City of Dallas, the City filed in the District Court of Dallas County a petition for a temporary and permanent injunction against Interstate, as sole defendant, to require Interstate to exclude persons under the age of 16 years from viewing "VIVA MARIA" and to advertise the motion picture as "not suitable for young persons." (P. Orig. Pet., Para. VI; R. 4.) In its petition, the City alleged that "VIVA MARIA" was a film:

> ". . . portraying sexual promiscuity in such manner as to be in the judgment of the Board likely to incite or encourage juvenile delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." (R. 3)[7]

The proposed classification was filed, the screening was requested and held, the classification order was entered and filed, the notice of non-acceptance was filed, and suit was commenced without any notice to United Artists or an opportunity for United Artists to be heard, despite its obvious constitutional interest in the unfettered exhibition of "VIVA MARIA."

United Artists appeared in the injunction proceeding by filing its Answer in Intervention (R. 6-15), and on February 16, 1966, was permitted to intervene over the City's objection that the trial court had no jurisdiction to determine the constitutional issues raised by United Artists. (R. 31-33)

7. The Motion Picture Classification Board itself specified no reason for its classification of "VIVA MARIA." These allegations first appeared in the petition, which was verified by a City attorney who was not a member of the Board. An objection was duly made on this ground. (R. 18)

Since the case was tried on City's prayer for a temporary injunction, under Texas procedure a jury was not available and the case was heard by a single judge. City offered testimony of three witnesses in support of the classification: John Gilliland, an attorney and vice chairman of the Board; Reverend James Robert Maceo, a member of the Board; and Frank Martin, captain in charge of the Dallas Police Department's juvenile bureau.

Mr. Gilliland admitted that the Board had made no specific finding as to why "VIVA MARIA" should be classified as "not suitable for young persons" (R. 63). In his opinion, the film fell afoul of those provisions in the ordinance which deal with portrayals of violence (R. 64, 67, 73-74) and sexual promiscuity (R. 67, 71-72). However, he was "sure" that alleged "sacrilege" had entered into the Board's determination (R. 64), and conceded that the film did not actually portray sexual promiscuity but at most merely implied it (R. 66, 68). In addition, he testified that the film did have some artistic value. (R. 67)

Reverend Maceo testified that in his opinion "VIVA MARIA" would tend to create the impression that sexual promiscuity was commonly accepted. (R. 81-82, 92) However, he likewise admitted that sexual promiscuity was never shown in the film (R. 81); that the question of "sacrilege" had been raised during the Board's deliberations (R. 94); and that the film did have artistic value. (R. 96) He also testified that the Board had based its decision solely on standards then prevailing in the local Dallas community. (R. 93-94)

Captain Martin testified merely that there were juvenile morals problems in the City of Dallas, but that he had no idea or opinion as to what caused such problems. (R. 98)

The City of Dallas offered no convincing evidence in support of its allegations that the film (1) "portray[ed]" sexual promiscuity, *or* that (2) it was likely to incite or encourage (a) juvenile delinquency *or* (b) sexual promiscuity on the part of young persons, *or* (3) that it would appeal to the prurient interests of young persons.[8]

Nevertheless, after hearing the testimony summarized above and viewing the film, the trial judge, called in from Waxahachie, Texas to hear the case, Honorable A. R. Stout, rendered the following oral opinion:

> "The Court: Oh, I realize you gentlemen might be right. There are two or three features in this picture that look to me would be unsuitable to young people. Actually, they have tried to track that Friedman [sic] case, looks like, in this ordinance, and if any ordinance can be passed, why, it looks like they have taken every ground to pass one, if one can be valid, that is, valid. So I enjoin the exhibitor, its agents, servants, attorneys and employees from exhibiting it. I guess it is like a book by Mark Twain where he had a vaudeville show and was making no money, the owners of it. Then he had a man to get nude and painted him in striped paint, charged a dollar, which was unheard of in those days, limited it to men only and said, 'If this doesn't get the money, I don't know Arkansas,' and they did quite well. I sustain the City's position, find it okay, and enjoin them." (R. 116-117)

8. United Artists introduced as evidence on behalf of the film the affidavit of its Dallas branch manager and several reviews of "VIVA MARIA." (I. Ex. 2; R. 115, 148-154)

On February 18, 1966, the second day of the film's initial Dallas engagement, the trial court enjoined defendant Interstate and intervenor United Artists from exhibiting or advertising "VIVA MARIA" except as "not suitable for young persons." (R. 155-156)

The Court of Civil Appeals

United Artists appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. (R. 156) Two justices of that court, acting in the absence of the third, viewed "VIVA MARIA" and on April 5, 1966 affirmed the trial court's judgment. (R. 178) Chief Justice Dixon, in whose opinion Associate Justice Bateman concurred, held, in the alternative, that "VIVA MARIA" was (1) "not suitable for young persons" under the ordinance standards; (2) obscene under the constitutional tests enunciated by this Court, and (3) obscene if such tests were modified so that the film would be "judged by the average young person." (R. 170) Whether the film had any social value was apparently immaterial: "We hold that 'VIVA MARIA' has only a minimum of social value, if any at all, as to children under the age of sixteen years." (R. 171) Justice Bateman, in whose opinion the Chief Justice concurred, held that the ordinance was not directed at motion pictures which were obscene and that "VIVA MARIA" could properly be classified as "not suitable for young persons" under the standards of the ordinance as written. (R. 174-175)

United Artists' Motion for Rehearing in the Court of Civil Appeals was denied on April 25, 1966. (R. 179-180)

The Supreme Court of Texas

On May 23, 1966, United Artists filed an Application for Writ of Error in the Supreme Court of Texas. The Application was refused on July 27, 1966, with the court indicating that it found "no error requiring reversal of the judgment of the Court of Civil Appeals." (R. 182) The Supreme Court of Texas so acted without even viewing "VIVA MARIA." United Artists next filed a Motion for Rehearing and then a Supplemental Motion for Rehearing, both of which were overruled by the Supreme Court of Texas on October 19, 1966. (R. 188)

This Court noted probable jurisdiction on May 15, 1967. (387 U.S. 903)

SUMMARY OF ARGUMENT

I.

(A) Motion pictures are a medium of expression protected by the First and Fourteenth Amendments. *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952). The exhibition of motion pictures cannot be restrained on grounds other than obscenity. *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Redrup v. New York*, 386 U.S. 767 (1967); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The Dallas classification ordinance, as written, as applied by the City of Dallas, and as construed by the Texas courts, restrains expression not on the basis of obscenity but on grounds "short of obscenity." (Respondent's Brief in Reply to United Artists

Corporation's Application for Writ of Error in the Supreme Court of Texas, pages 14, 15, 17); *Interstate Circuit, Inc. v. City of Dallas*, 402 S.W. 2d 770, 778 (Tex. Civ. App. 1966) (R. 174-175). Whether obscenity may be determined on the basis of definitions drawn expressly with minors in mind is therefore not an issue presented in this appeal. Although the Court of Appeals for the Fifth Circuit attempted to sustain the constitutionality of the ordinance by limiting its application to motion pictures which would be "obscene when viewed by an audience of young persons," *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, 599 (5th Cir. 1966), the constitutional validity of the ordinance must be adjudged by this Court on the basis of the ordinance as written and as construed by the Texas courts in this litigation. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

This Court has held that, short of actual incitement to conduct which the state may prohibit, it is constitutionally impermissible to restrain the nonobscene expression of ideas. *Kingsley Pictures Corp. v. Regents, supra; Terminiello v. Chicago*, 337 U.S. 1 (1949). The constitutional right of free speech protects expression to minors as well as to adults. *Police Commissioner of Baltimore v. Siegel Enterprises*, 233 Md. 110, 162 A. 2d 727 (1960), *cert. den.*, 364 U.S. 909 (1960); *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310 (1959); *William Goldman Theatres, Inc. v.*

Dana, 405 Pa. 83, 173 A. 2d 59, *cert. den.* 368 U.S. 897 (1961); *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69 (N. D. Ill. 1959); *Commonwealth v. Corey*, ... Mass. ...., 221 N.E. 2d 222 (1966). See also: Comment, "Exclusion of Children from Violent Movies," 67 *Colum. L. Rev.* 1149, 1158 (1967).

The Dallas classification ordinance is therefore void on its face.

(B) The standards contained in the Dallas ordinance are vague, indefinite and overbroad, and cannot constitutionally serve as a basis for restraining expression. The safeguards of the Constitution are applicable to minors as well as to adults. *In re Gault*, 387 U.S. 1 (1967); *People v. Kahan*, 15 N.Y. 2d 311, 206 N.E. 2d 333, 258 N.Y.S. 2d 391 (1965); *William Goldman Theatres, Inc. v. Dana, supra.* The precision required in standards relating to the dissemination of speech has never been held to be diminished because the standards governed expression to minors rather than to adults. *People v. Kahan, supra; William Goldman Theatres, Inc. v. Dana, supra.* See also: Comment, "Exclusion of Children from Violent Movies," *supra*, at 1166.

The standards contained in the Dallas ordinance for determining whether exhibition of a motion picture may be restrained as "not suitable for young persons" are unconstitutionally vague. See *Winters v. New York*, 333 U.S. 507, 515 (1948); *Commercial Pictures v. Regents*, 346 U.S. 587

(1954); *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 201 N.E. 2d 14, 252 N.Y.S. 2d 433 (1964). Conditioning the restraint on the likelihood of "incitement" or "encouragement" does not cure the vagueness of the standards. See *Winters v. New York, supra; Police Commissioner of Baltimore v. Siegel Enterprises, supra; People v. Bookcase, Inc., supra; Katzev v. County of Los Angeles, supra; Adams v. Hinkle*, 51 Wash. 2d 763, 322 P. 2d 844 (1958). That portion of the ordinance which defines "incitement" by whether a motion picture would probably create an impression on young persons that certain conduct is "profitable, desirable, acceptable, respectable, praiseworthy, or commonly accepted" only serves to compound the vagueness. *Kingsley Pictures Corp. v. Regents, supra*, at 701 (Clark, J., concurring).

The vagueness of the individual standards is aggravated by the numerous grounds upon which a motion picture may be restrained under the ordinance. Forty-six separate and distinct grounds for classification are provided therein, thereby creating an overbreadth which impairs freedom of expression. See *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

II.

Appellant United Artists has never been informed of the basis on which "VIVA MARIA" was classified "not suitable for young persons." The record in this case indicates that

"VIVA MARIA" might have been (but not that it was) so classified (1) on the basis of any one of the 46 separate and distinct grounds contained in the ordinance, or (2) on the basis of some imprecise and faintly articulated variation of standards enunciated by some members of this Court. It also indicates that (3) some members of the Dallas Motion Picture Classification Board may even have reached beyond the terms of the ordinance itself to employ a constitutionally impermissible standard ("sacrilege") in finding the film "not suitable for young persons." The fact that it cannot be said with certainty that the classification was not based on such an invalid ground is by itself sufficient to require reversal of the judgment below. *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

In addition, if the standards of the classification ordinance are to be ignored and one or more of the various approaches to obscenity heretofore taken by the members of this Court are to be substituted in judging "VIVA MARIA," it is clear that it could not possibly be found obscene in the constitutional sense. See *Redrup v. New York*, 386 U.S. 767, 770-771 (1967). Moreover, neither the film itself nor the record in this case supports a finding that "VIVA MARIA" would be obscene when viewed by persons under the age of 16 years. It was not shown (1) that the film was primarily directed to such persons, *or* (2) that it did in fact appeal to the prurient interests of such persons, *or* (3) that it was patently offensive as to such persons, *or*

(4) that it was utterly without redeeming social value as to such persons. See *Mishkin v. New York*, 383 U.S. 502, 508-510 (1966); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966); *Manuel Enterprises, Inc. v. Day*, 370 U.S. 478, 486 (1962). Finally, the record is bereft of evidence showing that "VIVA MARIA" falls within the express terms of the ordinance's classification standards, either as written or as construed in this litigation. See *Thompson v. Louisville*, 362 U.S. 199 (1960).

Classification of "VIVA MARIA" as "not suitable for young persons" was therefore a clearly unconstitutional application of the ordinance.

III.

(A) "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). An administrative procedure for prior review of films is valid only if there is a guarantee of judicial participation before exhibition of a film is restrained on the basis of its content. *Freedman v. Maryland*, 380 U.S. 51, 55, 58-59 (1965). The Dallas ordinance does not guarantee a judicial determination that a motion picture is "not suitable for young persons" before its exhibition may be restricted in accordance with such a classification. The ordinance conditions judicial participation upon the filing of

a "notice of non-acceptance," thereby imposing a condition precedent to the exercise of a First Amendment right. An analogous condition precedent was held invalid by this Court in *Lamont v. Postmaster General*, 381 U.S. 301 (1965). The provision in the Dallas ordinance which conditions the institution of judicial proceedings upon the filing of a notice of non-acceptance is therefore violative of this Court's decisions in *Freedman v. Maryland, supra*, and *Lamont v. Postmaster General, supra.*

(B) The First Amendment guarantee of free expression encompasses distributors as well as exhibitors of motion pictures. *Lovell v. Griffin*, 303 U.S. 444, 452 (1938); *Bantam Books, Inc. v. Sullivan, supra, at* 64n.6. The Dallas ordinance does not accord any rights thereunder to the distributor of a film reviewed by the Motion Picture Classification Board, even though this Court has held repeatedly that persons whose legal rights are to be determined by administrative or judicial proceedings are constitutionally entitled to notice thereof and an opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Schroeder v. City of New York*, 371 U.S. 208, 211-214 (1962); *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314-315 (1950). See also: *Bantam Books, Inc. v. Sullivan, supra*, at 71. The fact that a distributor may sometimes receive some kind of informal notice of classification proceedings is no substitute for the due process requirement that the distributor of a motion picture be given direct, formal and specific notice of the date and nature of any proceeding vitally affecting its constitutional rights. *In re Gault*, 387 U.S. 1, 31-34 (1967);

City of New York v. New York, New Haven & Hartford Railroad Co., 344 U.S. 293, 297 (1953). Unless the distributor is accorded the right under the ordinance to notice and an opportunity to defend his motion picture, infringements of his First Amendment rights may too often go unremedied. *Bantam Books, Inc. v. Sullivan, supra,* at 64n.6.

As written, the Dallas ordinance is void on its face for failure to accord due process to the distributor of a motion picture reviewed by the Board.

ARGUMENT

I.

THE DALLAS CLASSIFICATION ORDINANCE IS VOID ON ITS FACE BECAUSE IT AUTHORIZES THE RESTRAINT OF MOTION PICTURES ON CONSTITUTIONALLY IMPERMISSIBLE GROUNDS.

A. The exhibition of motion pictures is restrained on grounds other than obscenity.

This Court may in some other case be faced with deciding the constitutionality of laws which restrict the sale or exhibition of obscene materials to minors on the basis of definitions of obscenity drawn expressly with minors in mind.[9] This is not such a case. The Dallas Classification Ordinance does not on its face purport to restrict, nor has it been applied by City or interpreted by the Texas courts

[9] Compare *Ginsberg v. New York* (No. 47, October Term, 1967), which has been set down for argument with this case.

as restricting, the exhibition of motion pictures which are obscene when viewed by persons under the age of 16 years.

The standards for classification contained in §46A-1(f)[10] of the Dallas ordinance are not, and are not intended to be, standards of what is deemed to be obscene to persons under 16 or any other age group. The City has sought to protect young persons from certain ideas and portrayals, all short of any concept of obscenity. The City has consistently so recognized and indeed has so contended throughout this and related litigation:

> "We disagree with that portion of Petitioner's [United Artists'] Brief, which states that the only unprotected area of expression at which the Dallas Ordinance could be said to be directed, is that of obscenity because if the motion pictures are actually obscene, then they are not entitled to the privileges and the immunities granted under the First Amendment of the Constitution of the United States anyway. *It is something short of obscenity that is being classified in this Ordinance.*[11]
>
> * * *
>
> "* * * If the movies are required to be obscene insofar as young persons are concerned, then no ordinance would be required to suppress them because they would not have any standing under the United States Constitution."[12]

[10] Supra pgs. 3, 4.

[11] Pages 14-15, Respondent's Brief in Reply to the Petitioner United Artists Corporation's Application for Writ of Error, filed in the Supreme Court of Texas, a part of the Record herein though not printed. (Emphasis added)

[12] *Id.* page 17. This identical position is asserted by City on Page 8 of its pending Petition for a Writ of Certiorari in No. 44, October Term 1967, *City of Dallas v. Interstate Circuit, et al:*

"The one thing that the Circuit Court failed to recognize is that if the standard ["obscene when viewed by an audience of young persons"] is applied as suggested by that Court and the movie is obscene insofar as young persons is concerned, then its presentation to young persons may be totally prohibited because it is not protected under the First Amendment to the Constitution. It need not be classified; it can be denied."

The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in this case, in applying the ordinance, similarly did not restrict it, or interpret it as being restricted, to motion pictures which are obscene when viewed by an audience of young persons. In his concurring opinion below (R. 174-175), Justice Bateman, with whom Chief Justice Dixon concurred, wrote:

> "It is my firm opinion that the constitutional guarantees of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as 'not suitable for young persons' is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States Supreme Court intended, in Near v. Minnesota, 283 U.S. 697, 716, 75 L. Ed. 1357, 1367, or in any other case, to make such a stringent limitation on the powers of a state or city in this field.
>
> "The ordinance under examination, in defining the phrase 'not suitable for young persons,' does not employ the words 'obscene' or 'obscenity'. The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted * * *"

In the action brought in the Federal court challenging the constitutionality of this ordinance, both the District Court for the Northern District of Texas, and the Court of Appeals for the Fifth Circuit recognized its invalidity as written and sought to sustain its constitutionality by redrafting its standards to mean obscene for children.

The Court of Appeals rejected the City's contention that under the authority of *Prince v. Massachusetts*, 321 U.S. 158 (1943), and *Jacobellis v. Ohio*, 378 U.S. 184 (1964), material other than obscenity could be validly restricted as to minors. It stated:

> "* * * As forceful as these arguments may be for the expansion of the scope of the classification standards, the long history of the misuse of the censorship power convinces us that the standard for classification must be restricted to the control of obscenity * * *" (366 F. 2d 590, 598)

The Court of Appeals (Judge Cox dissenting) then concluded that the District Court was correct in limiting the application of the "not suitable for young persons" classification to films that are "obscene when viewed by an audience of young persons". (366 F. 2d at 599)

Judge Cox, in his dissenting opinion, noted:

> "* * * But this Dallas ordinance says nothing about obscenity, and the trial judge gave it a helpful nudge in that direction to provide the basis for the cross appeal here. [By the City of Dallas] But the Court could not by its proviso give, or ascribe to the ordinance something not said or to be found therein * * *" (366 F. 2d at 609)

At issue is the constitutionality of the ordinance as enacted and as construed by the Texas Court rather than the constitutionality of the ordinance with the judicial interpretive surgery performed in the Federal Courts, even if its constitutional defects could have been so cured. The ordinance must be adjudicated on the basis of its construction

by the Texas Court in this litigation. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

The Texas Court of Civil Appeals, which had the opinion of the Federal District Court before it and to which it referred in its opinion, did not adopt that Court's construction. It refused to limit its interpretation of the ordinance to "obscene when viewed by an audience of young persons," and instead applied the ordinance as broadly as it was written, or, perhaps, even more so. (See Point II, *infra.*) The Supreme Court of Texas did not see fit to review this construction, even though it was fully aware not only of the Federal District Court's limited construction of the ordinance but also the affirmance of that construction by the Court of Appeals for the Fifth Circuit.[13]

As written and as applied in this case by the Texas courts, the ordinance lays a restraint on the exhibition of motion pictures in terms of their content and the ideas they may express. In *Burstyn v. Wilson*, 343 U.S. 495 (1952), this Court, departing from its prior rulings and extending to motion pictures the protection of the First Amendment, noted as a basis therefor:

> "It cannot be doubted that motion pictures are a significant medium of communication of ideas. They may affect public attitudes and behaviour in a variety of ways ranging from a direct espousal of a political or social doctrine to a subtle shaping of thought which characterizes all artistic expression." (343 U.S. at 502)

[13] United Artists filed a Supplemental Motion for Rehearing in the Supreme Court of Texas on September 30, 1966, in which it urged the Court to consider the conflict in the opinions of the Court of Civil Appeals and the opinion of the Court of Appeals for the Fifth Circuit filed on August 30, 1966. (R. 183) This Supplemental Motion was denied on October 19, 1966. (R. 188)

And yet it is precisely that "subtle shaping of thought which characterizes all artistic expression" which Justice Bateman in the court below stressed in applying the ordinance to "VIVA MARIA" and in repulsing the challenge to its constitutionality. He wrote:

> "The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted [The last being the standards of the ordinance.]." (R. 174.)

The standards of the ordinance to which Judge Bateman referred closely resemble the provisions of the New York statute held invalid by this Court in *Kingsley Pictures Corp. v. Regents, supra.* The New York statute authorized the banning of motion pictures which were "immoral in that they portray acts of sexual immorality as desirable, acceptable or proper patterns of behavior". The New York Court of Appeals upheld the denial of a license to the motion picture "LADY CHATTERLY'S LOVER", even though the picture was concededly not obscene, "because the subject matter is adultery presented as being right and desirable for certain people under certain circumstances". The language of this Court in reversing the New York Court of Appeals is equally applicable to §46A-1(f), particularly as interpreted by Judge Bateman in that portion of his opinion quoted above. Justice Stewart stated:

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that pic-

ture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.

"It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

"Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.' Whitney v. California, 274 U.S. 357, at 376 (concurring opinion)." (360 U.S. at 688-689)

See also: *Terminiello v. Chicago*, 337 U.S. 1 (1949).

The constitutional right of free speech protects expression of ideas to minors as well as to adults. The Maryland Court of Appeals recognized the necessity of such protection in *Police Commissioner of Baltimore v. Siegel Enterprises*, 233 Md. 110, 120, 162 A. 2d 727, 731 (1960):

"* * * The right of young persons to read what they will, within the limits of permissible State or Federal action, is vital not only to them but to all protected citizenry. The exclusion of obscenity from protected utterance does not carry with it the right to obscure from

young or old facts or events, however unpleasant, disturbing or violent. *It is through realization, in formative years, of the meaning of the ordered liberties protected by the Constitution that an adult citizenry is most apt to have the feelings and thoughts and to take the actions which are 'the real protection against attempts to strait-jacket the human mind.'* Mr. Justice Frankfurter, concurring, Dennis v. United States, 341 U.S. 494, 556 (71 S. Ct. 857, 95 L. Ed. 1137); see Thornhill v. Alabama, 310 U.S. 88, 95 (60 S. Ct. 736, 84 L. Ed. 1093)." (Emphasis added)

Accord: *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310 (1959); *William Goldman Theatres v. Dana*, 405 Pa. 83, 173 A. 2d 59, cert. den. 368 U.S. 897 (1961); *Commonwealth v. Corey*, ... Mass. ..., 221 N.E. 2d 222 (1966). See also: Comment, "Exclusion of Children from Violent Movies" 67 *Colum. L. Rev.* 1149, 1158 (1967).

The Dallas ordinance, as enacted and as applied by the City and the Texas courts permits the Dallas Board to determine "in its judgment" what ideas are or are not "desirable, respectable, or praiseworthy" for young persons, completely without regard to the obscenity of the material. Such a restraint on protected speech cannot be countenanced.[14]

[14] If the Dallas Motion Picture Classification Board may constitutionally review and pass upon the acceptatbility of ideas for young persons, then so could other boards in cities and towns throughout the country, each making its own judgment as to whether the content of the motion picture was presented as "acceptable" or "proper" for young persons. The Dallas Ordinance has already become a model classification ordinance. Statutes similar to the Dallas ordinance were introduced during the 1967 Legislative sessions in the States of Rhode Island, Alaska, Texas and in the town of Middletown, Pennsylvania. The Judiciary Committee of the Legislative Council of Maryland recently proposed the introduction of an amendment to its censorship statute which would be a "carbon copy" of the Dallas Ordinance.

B. The grounds for restricting a motion picture as "not suitable for young persons" are vague, indefinite and overbroad.

This Court has long recognized that standards in statutes or ordinances which authorize restraints upon expression must be "defined with appropriate definiteness." *Winters v. New York*, 333 U.S. 507, 515 (1948). For indeed, if not, the "free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959). "Precision of regulation must be the touchstone in an area so closely touching our precious freedom." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). See also: *Keyishian v. Board of Regents*, 385 U.S. 589, 599 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966), *Baggett v. Bullitt*, 377 U.S. 360, 372, 373 (1964).

Consistently, this Court has thwarted the attempts of censors to exclude motion pictures from public view by setting aside the standards under which the censors had applied their ban as too vague to satisfy constitutional guarantees. In *Burstyn v. Wilson*, 343 U.S. 495 (1952), this Court found the criterion "sacrilegious" so vague as to be offensive to the constitutional guarantee of free expression. This Court similarly invalidated on the score of indefiniteness the standards of the ordinance of Marshall, Texas, which barred the showing of any motion picture which in "the opinion" of the local board of censors was "of such character as to be prejudicial to the best interests of the people of said city." *Gelling v. Texas*, 343 U.S. 960 (1952).

On the authority of *Burstyn*, this Court, in per curiam opinions, invalidated a censor board's commission to license

only motion pictures of "a moral, educational or amusing and harmless character," *Superior Films v. Department of Education*, 346 U.S. 587 (1954), and at the same time voided the direction to the New York State Censor Board to disapprove "immoral" motion pictures or a motion picture of such character that "its exhibition would tend to corrupt morals," *Commercial Pictures v. Regents*, 346 U.S. 587 (1954). Thereafter, on the authority of *Burstyn* and *Superior*, this Court, per curium, reversed the Kansas Censor Board's rejection of a motion picture based on its authorization to disapprove films deemed "cruel, obscene, indecent, immoral or such as tend to debase or corrupt morals," *Holmby v. Vaughn*, 350 U.S. 870 (1955).

The need for precision has not been diminished because the standards governing the censor's reach permit a restraint on dissemination to children rather than adults. This Court has never suggested that vagueness can be a variable concept, changing according to whether the First Amendment rights of children rather than of adults are restrained.[15] Indeed, this Court recently stated that "* * * neither the Fourteenth Amendment nor the Bill of Rights is for adults alone * * *" *In Re Gault*, 387 U.S. 1, 13 (1967); See also *Trimble v. Stone*, 187 F. Supp. 483, 486 (D.D.C. 1960).

[15] See Comment, "Exclusion of Children from Violent Movies," 67 *Colum. L. Rev.* 1149, 1166. Indeed, there may be valid reasons for requiring greater precision in statutes directed to children. Although the precise limits of obscenity which is outside the protection of the First Amendment may be the subject of divergent views among the members of this Court, there has been much history and judicial experience in determining what is "obscene." What is obscene when disseminated to children has no technical or settled legal meaning and there is a paucity of judicial decision on this question.

Concurring in a determination that a New York statute designed to control the dissemination of material to minors was unconstitutionally vague, Judge Fuld of the New York Court of Appeals clearly enunciated the applicable principle:

> "* * * It is, however, essential that legislation aimed at protecting children from allegedly harmful expression —no less than legislation enacted with respect to adults —be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *People v. Kahan*, 15 N.Y. 2d 311, 313, 206 N.E. 2d 333, 335 (1965).

See also: *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 173 A. 2d 59, Cert. den. 368 U.S. 897 (1961); and *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959).

The standards contained in the Dallas ordinance for restricting the exhibition of motion pictures as "not suitable for young persons" are not narrowly drawn, reasonable and definite.

Section 46A-1(f)[16] sets forth the standards which the Board must apply in determining whether the exhibition of a motion picture may be restrained as "not suitable for young persons". In determining that a picture is "not suitable" for children, the Board must first determine whether the picture describes or portrays brutality or criminal violence or depravity or nudity or sexual promiscuity or extramarital or abnormal sex relationships. If the picture describes

[16] § 46A-1(f), set out in full *supra*, pgs. 3, 4, and *infra*, App. B.

or portrays any of these phenomena, then the Board must determine whether the portrayal is such that it is likely "to incite or encourage" crime or delinquency or sexual promiscuity on the part of young persons. Because of the disjunctives within the Section, there are 46 different grounds which might result in the classification of a picture,[17] but none is sufficiently precise to withstand constitutional attack.

For example, the terms "sexual promiscuity", "extra-marital relations" and "abnormal sex relations" are unworkably vague. Indeed, the City, in attempting to enforce classification of the motion picture "THE SILENCERS" on the ground of "sexual promiscuity," found that term so imprecise that it later amended the ordinance in an attempt to clarify its meaning.[18]

A similar ground for controlling dissemination of material to minors—"sexual immorality"—was found unconstitutional by the New York Court of Appeals in *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 201 N. E. 2d 14 (1964).

The vagueness of the standards is not cured by the requirement that the description or portrayal be one which, in the judgment of the Board, is "likely to incite or encourage crime delinquency or sexual promiscuity on the part of young persons." See *Winters v. New York, supra.* The Court there said:

> "* * * The subsection of the New York Penal Law, as now interpreted by the Court of Appeals, prohibits distribution of a magazine principally made up of criminal

[17] See App. B, *infra.*

[18] The amendment is set out in N. 2, *supra.*

> news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the structure to collections of stories 'so massed as to become vehicles for inciting violent and depraved crimes against the person * * *' we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner * * *" (333 U.S. at 518-519)

The highest courts of several states have followed the *Winters* rationale in declaring void for vagueness statutes designed to control the dissemination of written material to minors, even though application of those statutes was predicated on the possibility of "incitement." See, e.g. *Police Commissioner of Baltimore v. Siegel Enterprises*, 233 Md. 110, 162 A. 2d 727 (1960), cert. denied, 364 U.S. 909 (1960); *People v. Bookcase, supra; People v. Kahan, supra; Adams v. Hinkle*, 51 Wash. 2d 763, 322 P. 2d 844 (1958); *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310, 317-318 (1959).

The ordinance conditions application of the phrase "likely to incite or encourage crime delinquency or sexual promiscuity" upon whether "in the judgment of the Board [the motion picture] creates an impression on young persons that such conduct is profitable, desirable, acceptable, respectable, trustworthy or commonly accepted." (Section 46A-1(f)) Instead of clarifying the ambiguity inherent in the initial

phrase, the added condition not only compounds the vagueness of the standards but also provides the Motion Picture Classification Board with a "roving commission" to classify motion pictures. Another local classification ordinance in which the application of standards was similarly conditioned was held invalid in *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. (1959)). In that case, the phrase "tends to create a harmful impression on the minds of children" was held to render the local ordinance "hopelessly indefinite." *Id.* at 72.

In addition, in *Kingsley Pictures Corp. v. Regents, supra*, this Court invalidated that part of a New York statute which authorized the prohibition of motion pictures which were deemed to portray "acts of sexual immorality * * * * as desirable, acceptable or proper patterns of behavior. Justice Clark, who concurred in this Court's holding that the standard was unconstitutional, did so on the ground that it was "vague and indefinite." In his opinion:

> "What may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included within the terms 'desirable, acceptable or proper.' This is nothing less than a roving commision in which individual impressions become the yardstick of action, and results in regulation in accordance with the beliefs of the individual censor rather than regulation by law * * * I need only say that the obscurity of the standard presents such a

> choice of difficulties that even the most experienced find themselves at dagger's point." (360 U.S. at 701)

The vice of the restraint on motion pictures in terms so vague as those of the ordinance here was pointed out by Mr. Justice Frankfurter, concurring in *Burstyn, supra*:

> "* * * To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art — for the films are derived largely from literature. * * *" (at page 531)

The vagueness of the standards contained in the Dallas ordinance is further aggravated by the numerous grounds upon which exhibition of a motion picture may be restrained as "not suitable for young persons." Because of the disjunctive wording of Section 46-A-1(f), there are forty-six separate and distinct grounds upon which the Board may classify a film. (App. B, *infra.*) This prolixity and profusion creates an overbroad sweep which impairs freedom of expression. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The administrative application of such vague, indefinite and overbroad standards has never been countenanced by this Court.[19]

There is no justification for making an exception with respect to the forty-six vague and indefinite standards contained in Section 46A-1(f) of the Dallas ordinance.

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[19] See Amsterdam, "Void for Vagueness Doctrine in the Supreme Court," 109 *Pa. L. Rev.* 67, 93-94, Notes 140-142 and cases cited therein.

II.

THE DALLAS CLASSIFICATION ORDINANCE AS APPLIED IMPOSED AN UNCONSTITUTIONAL RESTRAINT ON EXHIBITION OF THE MOTION PICTURE "VIVA MARIA."

Throughout these proceedings, United Artists has been at a complete loss to determine upon what basis exhibition of the film "VIVA MARIA" was restrained as "not suitable for young persons."

The Motion Picture Classification Board, by the admission of one of its members (R. 63), made no specific finding as to why the film should have been classified as "not suitable for young persons."[20] Testimony at the trial of the case indicated that various members of the Board had voiced different objections to the film, including alleged "sacrilege" (R. 64, 94), alleged portrayal of violence (R. 64, 67, 73-74), and alleged portrayal of sexual promiscuity (R. 67, 71-72, 81-82, 92). In addition it was admitted (R. 60, 70) that only five of the eight Board members who discussed the film and voted in favor of the classification had actually seen "VIVA MARIA."

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[20] The Court of Civil Appeals likewise conceded that the Board, and the trial court as well, had made no specific finding as to why "VIVA MARIA" should have been classified as "not suitable for young persons" (R. 170).

One way to inhibit such a capricious exercise of censorial power would be to require the Board to articulate with specificity the reasons for its decisions. See *American Civil Liberties Union v. City of Chicago*, 13 Ill. App. 2d 278, 286, 141 N.E. 2d 56, 60 (1957); *Capitol Enterprises, Inc. v. City of Chicago*, 260 F. 2d 670, 675, 676 (7th Cir. 1958); *Zenith International Film Corp. v. City of Chicago*, 291 F. 2d 785, 789-790 (1961). See also: *Kent v. United States*, 383 U.S. 541, 561 (1966).

In its petition for a temporary injunction, the City of Dallas took the position that "VIVA MARIA" was a film "* * * portraying sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or encourage juvenile delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests" (R. 3). However, the City offered no convincing evidence in support of its allegations that the film (1) "portray[ed]" sexual promiscuity, *or* that (2) it was likely to incite or encourage (a) juvenile delinquency *or* (b) sexual promiscuity on the part of young persons, *or* that (3) it would appeal to the prurient interests of young persons.

The trial judge articulated no reason for his decision upholding the classification (R. 116-117). Moreover, notwithstanding the express command of the ordinance that motion pictures reviewed thereunder be judged "as a whole" (Section 46A-1(f); R. 121-122), the trial judge reached his decision solely on the basis of "two or three [unspecified] features" in "VIVA MARIA" (R. 116).

The opinions of the Court of Civil Appeals are not appreciably more helpful. One justice thereof thought that "VIVA MARIA" was, in the alternative, (1) "not suitable" under the Standards of the Ordinance as enacted; (2) obscene under the constitutional tests enunciated by this Court; and, (3) obscene if such tests were modified so that the film would be "judged by the average young person" (R. 170), even though he conceded that the film might possess some social value for persons under the age of 16 years (R. 171). The other justice held that "VIVA MARIA" could properly be classified as "not suitable" under the standards

of the ordinance as enacted (R. 174-175). The opinions of both justices are conclusory only, and contain no discussion whatsoever of the film's content.

The Supreme Court of Texas refused to issue writs of error, finding, without even having viewed the film, that there was "no error requiring reversal" (R. 182).

In short, the record in this case indicates that "VIVA MARIA" might have been (but not that it was) classified (1) on the basis of any one of the 46 separate and distinct grounds contained in the ordinance (see App. B, *infra*), or (2) on the basis of some imprecise and faintly articulated variation of standards enunciated by some members of this Court, or that (3) some members of the Dallas Motion Picture Classification Board may even have reached beyond the terms of the ordinance itself to employ a constitutionally impermissible standard ("sacrilege") in finding the film "not suitable for young persons."

As this Court has repeatedly emphasized in cases of this type, where a restraint involves possible infringement of the First Amendment guarantee of free expression, this Court must make its own "independent constitutional judgment on the facts of the case" to determine whether the restraint is constitutionally permissible. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 187-190 (1964). See also: *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

A viewing of "VIVA MARIA" shows that the film is composed of a succession of so-called "sight gags" and one-line jokes of a completely innocuous nature. One of its heroines leads a comic opera revolution with absolute ease;

the other swings through the trees with all the aplomb of Tarzan. Its villains are ludicrously villainous, from an evil ranchero whom Pearl White would have dispatched quickly to an overdressed military dictator slowed down by the weight of his medals. The film is intended, to use the words of Bosley Crowther, film critic for *The New York Times*, as nothing more than "light-hearted fun" (R. 151).

(A) *"VIVA MARIA" is not obscene.* The members of this Court have enunciated various tests by which the constitutional obscenity of material is to be judged. See *Redrup v. New York*, 386 U.S. 767, 770-771 (1967). Whichever of these tests is applied in judging the film "VIVA MARIA," it is clear that it could not possibly be found obscene in the constitutional sense. Indeed, the City of Dallas has never contended that the film is obscene. The alternative holding to the contrary by one justice of the Court of Civil Appeals is patently erroneous.

(B) *"VIVA MARIA" is not obscene when viewed by persons under the age of 16 years.* Throughout these proceedings, the City of Dallas has neither contended nor introduced evidence to show that "VIVA MARIA" would be obscene when viewed by persons under the age of 16 years. Indeed, the City has consistently contended exactly the opposite: that in applying the ordinance to "VIVA MARIA" it was aiming at something less than obscenity, regardless of the age of the audience. (See page 26, supra.)

This Court has previously held that the burden is on those who seek to restrain expression to prove that the restraint is constitutionally permissible. *Freedman v. Mary-*

land, 380 U.S. 51, 58 (1965). The City of Dallas has not met that burden in this case.

If the prurient interest appeal of the material is to be judged on any basis other than its appeal to the "normal, average" adult, it must first be shown that the material was designed for or primarily disseminated to the limited group upon the basis of whose prurient interests the appeal of the material is to be judged. *Mishkin v. New York*, 383 U.S. 502 508-510 (1966); *United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun,"* 373 F. 2d 635, 640-641 (4th Cir. 1967);[21] Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards," 45 *Minn. L. Rev*, 5, 77-79, 82 (1960); [22] and, American Law Institute, *Model Penal Code*, 1962 Proposed Official Draft, Section 251.4(1).[23] There is no evidence in the record which would show that "VIVA MARIA" was primarily directed to persons under the age of 16 years; the City of Dallas has never so contended, and the Court of Civil Appeals did not so find.

[21] Petition for certiorari filed on other issues. 35 U.S.L. Week 3413 (U.S. May 15, 1967).

[22] According to Lockhart and McClure, "variable obscenity requires first a determination of the audience to which the material is primarily directed * * *" *Id.* at 78-79. Although in a later section of their article, *Id.* at 85-88, the authors speculate that this Court might uphold legislation prohibiting minors from viewing material not primarily directed to them, they offer no reason in support of their speculation. Indeed, such speculation is inconsistent with the "primary audience" concept upon which they base their theory of "variable obscenity."

[23] The relevant portion of Section 251.4(1) provides as follows: "* * * Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience * * *"

Assuming that the material is primarily directed to the group upon the basis of whose prurient interests the appeal of the material is to be judged, it must also be shown that the material does in fact appeal to the prurient interests of that group. *Mishkin v. New York, supra,* at 509-510; *United States v. Klaw,* 350 F. 2d 155, 165-168 (2d Cir. 1965). There is no competent evidence in the record which would show that "VIVA MARIA" appeals to the prurient interests of persons under the age of 16 years.

In addition, it must be shown that "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Memoirs v. Massachusetts,* 383 U.S. 413, 418 (1966); *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 486 (1962). There is nothing in the record which would show that "VIVA MARIA" is patently offensive to persons under the age of 16 years or that it affronts the prevailing standards of the adult community as to what is suitable for persons under the age of 16 years.

Finally, it must be shown that the material is "utterly without redeeming social value." *Memoirs v. Massachussetts, supra,* at 418. The social value of the material cannot be weighed against its prurient interest appeal. *Id.* at 419. In the case at bar, the City did not attempt to show that "VIVA MARIA" was utterly without redeeming social value as to persons under the age of 16 years. Indeed, both witnesses Gilliland and Maceo, and perhaps the Court of Civil Appeals, conceded that the film had some social value as to such persons. Clearly, in such a situation it cannot be said that "VIVA MARIA" is utterly without redeeming social

value as to persons under the age of 16 years. Douglas, J., concurring in *Memoirs v. Massachusetts, supra,* at 426; *Attorney General v. A Book Named "Naked Lunch,"* ....Mass....., 218 N.E. 2d 571 (Sup. Jud. Ct. 1966); *City of Phoenix v. Fine,* 420 P. 2d 26, 30 (Ariz. Ct. App. 1966).

In short, the City of Dallas has never contended that "VIVA MARIA" would be obscene when viewed by persons under the age of 16 years. The alternative holding to the contrary by one justice of the Court of Civil Appeals is supported neither by the film itself nor by the record in this case, and therefore cannot stand.

(C) *"VIVA MARIA" cannot constitutionally be classified as "not suitable for young persons" under the terms of Ordinance No. 11284.* Section 46A-1(f) sets forth 46 separate and distinct grounds upon which the Dallas Motion Picture Classification Board may base a "not suitable" classification. (App. B, *infra.)*

Although the Board itself never specified any reason for its classification of "VIVA MARIA," testimony at the trial of the case in the District Court of Dallas County indicates that various members of the Board advanced at least three reasons therefor: (1) alleged "sacrilege," (2) alleged portrayal of violence, and (3) alleged portrayal of sexual promiscuity.

"Sacrilege" is not a constitutionally permissible ground upon which to restrain speech, *Burstyn v. Wilson,* 343 U.S. 495 (1952), nor is such a ground even set fourth in Section 46A-1(f). The fact that it cannot be said with certainty that the classification of "VIVA MARIA" was not based in whole or in part on such an invalid ground is by itself

sufficient to require reversal of the judgment below. *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

Board member Gilliland indicated that he thought "VIVA MARIA" fell under those portions of Section 46A-1(f) which deal with violence. However, both he and Board member Maceo admitted that whatever violence the film contained was of a ludicrous and exaggerated sort which no one would take seriously or could reasonably relate to actual human experience. (R. 64-65, 67-68, 88-91.) As the film itself shows, the violence portrayed therein is of the innocuous slapstick variety which has met with widespread public acceptance and appreciation from the early films of Mack Sennett to the latest cartoons of Walt Disney. Indeed, Mr. Gilliland admitted that his only objection to the film's portrayal of violence was the involvement of the clergy therein (R. 64). It would therefore have been clearly unconstitutional to sustain the classification of "VIVA MARIA" on the basis of the violence portrayed therein.

Board members Gilliland and Maceo[24] both testified that in their opinion "VIVA MARIA" would tend to create the impression on "young persons" that sexual promiscuity was commonly accepted. As each admitted, however, the film does not "describe" or "portray" sexual promiscuity but at most merely implies it—an implication which they read into the film on the basis of their experience as adults.

[24] Mr. Gilliland's sole qualification as an expert witness apparently was that he was the father of two children (R. 60). Reverend Maceo's qualifications were only slightly less dubious (R. 85-86). See *Hewitt v. Maryland State Board of Censors*, 243 Md. 574, 221 A. 2d 894 (1966); *State v. Watson*, ... Ore. ....., 414 P. 2d 337 (1966).

Neither was asked to view the film from the perspective of a person under the age of 16 years. Moreover, the Court of Civil Appeals did not find, but apparently merely assumed, that the film "described" or "portrayed" sexual promiscuity.[25] Classification of "VIVA MARIA" for "describing" or "portraying" sexual promiscuity, as the terms of Section 46A-1(f) expressly require, was therefore a clearly erroneous, overbroad and unconstitutional application of the ordinance. See *Thompson v. Louisville*, 362 U.S. 199 (1960).

Briefly, the film "VIVA MARIA" is no more, and perhaps less, violent than the Western films which persons under the age of 16 years may view daily both in motion picture theatres and on television. Sexual promiscuity is never expressly "described" or "portrayed" therein; at most, there are a few vague, allusions thereto. Upon such a showing, the Board cannot sustain its classification of "VIVA MARIA" as "not suitable for young persons" under the terms of Ordinance No. 11284. To permit it to do so would, in effect, empower the Board to exclude persons under the age of 16 years from almost any movie, a result which appellant United Artists believes the Constitution and this Court would never permit.

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[25] Chief Justice Dixon held that "the implied findings of the Board and the district court" that the film was obscene were "amply" supported by the evidence (R. 170). However, neither the Board, the City nor the trial judge had ever intimated that they considered the film obscene.

Associate Justice Bateman held that the film was properly classified under the terms of the ordinance (R. 174-175).

III.

THE DALLAS CLASSIFICATION ORDINANCE IS VOID ON ITS FACE FOR FAILURE TO PROVIDE THE PROCEDURAL SAFEGUARDS REQUIRED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY PRIOR DECISIONS OF THIS COURT.

Under the terms of Ordinance No. 11284, it is unlawful "[t]o exhibit any film which has not been classified as provided in this ordinance." (Section 46A-4(a)(1); R. 125) The ordinance imposes criminal sanctions against "young persons" and exhibitors who do not comply with its submission, exhibition, admission and advertising requirements at the rate of $200.00 for each offense, with each day of non-compliance constituting a separate offense. (Section 46A-11.2; R. 133) In addition, the City Council may under certain circumstances revoke an exhibitor's license to show motion pictures which have been classified as "not suitable for young persons." (Section 46A-6; R. 127-128) Insofar as relevant to the instant appeal, the ordinance establishes the following classification procedures:

> (1) Before any motion picture may be exhibited within the city limits of the City of Dallas, an exhibitor must file a "proposed classification" with the Dallas Motion Picture Classification Board. (Section 46A-3(a); R. 124)
>
> (2) The Board must act within five (5) days thereafter, and may direct that the film be projected for consideration by the Board at "the earliest time practicable." (Setcion 46A-3(a, b); R. 124)
>
> (3) If a screening is held, the Board must issue its classification order within two (2) days thereafter, and

notice of such order must be sent "to the exhibitor involved and to any other exhibitor who shall request such notice." (Section 46A-3(b, d); R. 124-125)

(4) "Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

> "(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance." (Section 46A-7(a); R. 128-129)

(5) If the District Court fails to issue an injunction within ten (10) days of the filing of the notice of non-acceptance, the Board's classification order is suspended automatically. (Section 46A-7(b); R. 131)[26]

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26. It will therefore be seen that the Ordinance allows in excess of 19 days (5 + X + 2 + 2 + 10 days) to elapse between submission of the "proposed classification" and a judicial determination on the merits in the court of initial jurisdiction. In the instant case, 26 days elapsed between submission of the proposed classification (January 24, 1966) and issuance of a temporary injunction by the District Court of Dallas County (February 18, 1966).

Although under the express terms of Section 46A-7(b) the Board's classification order is suspended automatically if the District Court fails to issue an injunction within ten days of the filing of the notice of non-acceptance, in practice this provision has proved meaningless.

For example, a notice of non-acceptance of the Board's "not suitable" classification of "BLOOD AND BLACK LACE" was filed on February 11, 1966. The City's request for a temporary injunction was *denied on* February 18, 1966. Although under Section 46A-7(b) the classification order should have been suspended since no injunction issued within ten days, a permanent injunction prohibiting exhibition of the film to persons under the age of 16 years was issued on March 24, 1966, forty-one days after the filing of a notice of non-acceptance. *City of Dallas v. Rowley United Theatres, Inc.*, District Court of Dallas County, 101st Judicial District, Case No. 66-1281-E.

(Footnote continued on following page)

(6) "Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) [sic] of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above." (Section 46A-7(c); R. 131-132)

A. *The Dallas Ordinance is void on its face for failure to require a judicial determination that a motion picture is "not suitable for young persons" before its exhibition may be restricted in accordance with such a classification.*

It is no longer open to question that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

In *Freedman*,[27] this Court held that an administrative procedure for prior review of films is valid only if:

(1) there is a guarantee of judicial participation before exhibition of a film is restrained on the basis of its content (380 U.S. at 55, 58-59);

(Footnote continued from preceding page)

Similarly, a notice of non-acceptance of the Board's "not suitable" classification of "THE SILENCERS" was filed on March 4, 1966. On March 15, 1966, when neither a temporary nor permanent injunction had issued, a motion to dismiss was made on the ground that no injunction had issued within ten days, as required by Section 46A-7(b). This motion was denied. Indeed, on May 4, 1966, two months after the filing of the notice of non-acceptance, the City took the position that "the original classification given to said film as being 'not suitable for young persons' remains in full force and effect." *City of Dallas v. Interstate Circuit, Inc.*, District Court of Dallas County, 14th Judicial District, Case No. 66-1928-A.

[27] The City has recognized the applicability of the *Freedman* case, stating: "The Dallas Motion Picture Classification Ordinance,

(Footnote continued on following page)

(2) "the burden of instituting judicial proceedings" rests on the censor *(Id.* at 59-60);

(3) the censor bears the burden of proving that his decision was correct *(Id.* at 58);

(4) "[a]ny restraint imposed in advance of a final judicial determination on the merits [is] * * * limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution" (*Id.* at 59); and

(5) "a prompt final judicial decision" is assured (*Id.* at 59).

The *Freedman* case struck down a censorship statute which in practice "lent an effect of finality to the censor's determination." 380 U.S. at 58. With respect to the first of the constitutional requirements enumerated above, Mr. Justice Brennan observed for a majority of this Court that:

> "* * * The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression only a procedure *requiring* a judicial determination suffices to impose a valid final restraint. [Citing cases.] To this end, the exhibitor must be *assured*, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film." (380 U.S. at 58-59) (emphasis added).

Contrary to *Freedman*, Ordinance No. 11284 does not guarantee a judicial determination that a particular film may properly be classified as "not suitable for young persons."

(Footnote continued from preceding page)
both on its face and as applied in this case, complies with the requirements as set forth by this Court in Freedman v. State of Maryland, 380 U.S. 51." (City's Motion to Dismiss United Artists' Appeal, Page 11.) Of course, City's recognition of the applicability of *Freedman* does not mean that the ordinance complies with the requirements set forth therein.

Instead, it conditions the institution of judicial proceedings upon the filing of a "notice of non-acceptance" by "any exhibitor," and creates a presumption that failure to file such notice constitutes knowing acceptance of the Board's classification. (Section 46A-7(a,c); R. 128, 131-132) Unless the notice of non-acceptance is filed in the manner prescribed by the ordinance, the City of Dallas is permitted to restrain exhibition of a film as "not suitable for young persons" without specifying any reason for the film's classification and without sustaining any burden of proof that the classification is constitutionally permissible.

United Artists contends that the City of Dallas cannot constitutionally condition its institution of judicial proceedings upon the filing of a notice of non-acceptance, and that the provision in Ordinance No. 11284 requiring such notice is unconstitutional on its face.

An attempt by the Federal Government to restrain the exercise of a First Amendment right by the imposition of a condition precedent apposite to the filing of a notice of non-acceptance was held invalid by this Court in *Lamont v. Postmaster General*, 381 U.S .301 (1965). At issue in *Lamont* was the constitutionality of a federal statute, as construed and applied, under which the Post Office Department was directed to detain "communist political propaganda" of foreign origin until the addressee thereof expressly indicated his desire to receive it. By regulation, "When it is determined that a piece of mail is 'communist political propaganda,' the

addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days." 381 U.S. at 303. In addition, "a notice is sent and must be returned for each individual piece of mail desired." *Ibid.* The Post Office Department presumed that those not returning the reply card did not want the identified publication or any similar one arriving in the future. *Id.* at 304.

This Court held unanimously that the statute, as construed and applied, violated the First Amendment. In the opinion of the Court, Mr. Justice Douglas wrote:

> "We conclude that the Act as construed and applied is unconstitutional because it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." (381 U.S. at 305)
>
> * * *
>
> "We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions." (381 U.S. at 307)

Mr. Justice Brennan, in whose concurring opinion Mr. Justices Goldberg and Harlan joined, noted that:

> "* * * the Government argues that, since an addressee taking the trouble to return the card can receive the

> publication named in it, only inconvenience and not abridgment is involved. But inhibition as well as prohibition against the exercise of First Amendment rights is a power denied the government. See, e.g., Freedman v. Maryland, 380 U.S. 51; Garrison v. Louisiana, 379 U.S. 64; Speiser v. Randall, 357 U.S. 513." (381 U.S. at 309)

Similarities are striking between the statutes and regulations involved in *Lamont* and the ordinance involved in the instant appeal: (1) each requires an affirmative act as a condition precedent to the exercise of a First Amendment right—mailing a reply card to the Post Office in one case and filing a notice of non-acceptance in the other; (2) in each case the affirmative action required of the addressee or exhibitor avoids immediate prohibiton or restriction only at a cost of inconvenience and inhibition heretofore held to be beyond governmental authorty; and, (3) it was presumed by the Post Office that failure to mail the reply card signified that the addressee did not desire to receive the detained material, whereas here the City of Dallas presumes that, in the absence of a notice of non-acceptance, the exhibitor agrees with the Board's "not suitable" classification of a particular motion picture, despite the fact that the exhibitor submitted such picture as "suitable."

There is sound reason, of course, for placing on the censor not only the burden of proof but also the burden of instituting judicial proceedings in every case to determine whether exhibition of a particular motion picture may con-

stitutionally be restrained.[28] For, as Mr. Justice Brennan pointed out in *Freedman*:

> "Without these safeguards it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can fully exhibit his film in most of the rest of the country * * *" (380 U.S. at 59).

To fully appreciate the wisdom of this forecast, one need only review the record of the Dallas Motion Picture Classification Board to see how final the censor's determination has been in the absence of a requirement that the City institute judicial proceedings with respect to each motion picture

[28] And indeed, except with respect to this ordinance, every court which has construed *Freedman* has interpreted it to require a judicial determination in every case. See, e.g., *Cambist Films, Inc. v. Board of Regents of the University of the State of New York*, 46 Misc. 2d 513, 260 N.Y.S. 2d 804, 809 (Sup. Ct. 1965); *State v. Columbia Pictures Corp.*, 197 Kan. 448, 417 P. 2d 255 (1966); *Reade v. City of Chicago*, United States District Court, Northern District of Illinois, Eastern Division, Case No. 67 C 322 (March 10, 1967) (memorandum opinion of Judge Bernard Decker) (not officially reported; *Embassy Pictures Corp v Hudson*, 242 F. Supp. 975, 977 (W.D. Tenn. 1965); *Smith v. Crumlish*, 207 Pa. Super. 516, 218 A. 2d 596, 600 (1966); *Trans-Lux Distributing Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A. 2d 235 (1965); *United States v. One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911, 919 (S.D.N.Y. 1966); *United States v. Reliable News Company*, 376 F. 2d 803, 805 (4th Cir. 1967).

claimed to be "not suitable for young persons." (App. C, *infra*.)[29]

In the instant case, had Interstate for its own reasons failed, or merely by inadvertence neglected, to file a notice of non-acceptance of the Board's classification order, exhibition of "VIVA MARIA" would have been finally restricted as "not suitable for young persons" by mere majority vote of an administrative board (only five of the nine members of which had even seen the film), without any specification of the reason or reasons for its classification, and without any judicial determination that the film could constitutionally be so classified. Enforcement of such restrictions in the absence of judicial participation has previously been held impermissible by this Court. *Freedman v. Maryland*, *supra*, at 55, 58-59; *A Quantity of Books v. Kansas*, 378 U.S. 205, 210, 212-213 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 71 (1963); *Marcus v. Search Warrant of Property*, 367 U.S.

[29] In summary, Appendix C shows that the Dallas Motion Picture Classification Board has classified as "not suitable for young persons" 32 motion pictures for which an exhibitor submitted, and did not voluntarily change, a proposed classification of "suitable for young persons." The City of Dallas has instituted judicial proceedings with respect to only four of these pictures. *City of Dallas v. Rowley United Theatres, Inc.*, District Court of Dallas County, 101st Judicial District, Case No. 66-1281-E ("BLOOD AND BLACK LACE") (petition filed February 14, 1966; permanent injunction issued March 24, 1966); *City of Dallas v. Interstate Circuit, Inc.*, District Court of Dallas County, 44th Judicial District, Case No. 66-1280-B ("VIVA MARIA") (petition filed February 14, 1966; temporary injunction issued February 18, 1966); *City of Dallas v. Interstate Circuit, Inc.*, District Court of Dallas County, 14th Judicial District, Case No. 66-1928-A ("THE SILENCERS") (petition filed March 7, 1966; no injunction issued); *City of Dallas v. Trans-Texas Theatres, Inc.*, District Court of Dallas County, 68th Judicial District, Case No. 66-9900-C ("THE LIQUIDATOR") (petition filed October 17, 1966; permanent injunction issued October 21, 1966).

717, 729-738 (1961). Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

In short, the prior decisions of this Court hold that where a right "of constitutional stature" is involved, a government may not condition its exercise upon "the exaction of a price." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). By conditioning its institution of judicial proceedings upon the filing of a notice of non-acceptance, the City of Dallas exacts such an inhibitory price. The provision in Ordinance No. 11284 which imposes such a condition precedent is therefore void on its face.[30]

B. *The Dallas Ordinance is void on its face for failure to accord due process to the distributor of a motion picture.*

It has long been recognized that the constitutional right of free expression embraces not only production and publica-

[30] The provision in the Dallas ordinance requiring the filing of a notice of non-acceptance is in no way analogous to the procedure employed by the Bureau of Customs in preventing the importation of obscene material. 46 Stat. 688 (1930), 19 U.S.C. §1305 (1964), 19 C.F.R. §§9.12(d), 12.40-41 (1966). Under administrative regulations, Customs officials are permitted to solicit assent to forefeiture by the claimant. The practice has been for Customs to mail a blank assent to forfeiture to the claimant, and to advise him that he may either assent or contest the Customs determination that the material is obscene. If the claimant does nothing—i.e., fails to return an executed assent to forfeiture—it is presumed that he wishes to contest the Customs determination and the matter is then referred to the appropriate United States Attorney for the institution of judicial proceedings. 19 C.F.R. §12.40(c,e) (1966). Thus, under the Customs procedure inaction by the claimant creates a presumption in favor of the material, whereas under the Dallas Ordinance inaction by the exhibitor creates a presumption against the film and in favor of the Board's classification. There is, of course, a considerable constitutional difference between imposing a condition precedent to the *surrender* of a First Amendment right, as the Custom procedure does, and imposing a condition precedent to the *exercise* of a First Amendment right, as the Dallas Ordinance does.

tion, but distribution, circulation, exhibition and sale as well. See, e.g., *Lovell v. Griffin*, 303 U.S. 444, 452 (1938); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64n.6 (1963). It has also long been recognized that the distributor of a film or publisher of a book suffers direct, palpable and legal injury when there is interference with the exhibition of its film or sale of its book. See, e.g., *Bantam Books, Inc. v. Sullivan, supra; Corsican Productions v. Pitchess*, 338 F. 2d 441 (9th Cir. 1964); *Embassy Pictures Corp. v. Hudson*, 226 F. Supp. 421, 424-425 (W.D. Tenn. 1964); *Kingsley International Pictures Corp. v. Blanc*, 396 Pa. 448, 153 A. 2d 243, 246 (1959). See also: *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536 (1925); *Truax v. Raich*, 239 U.S. 33, 38-39 (1915).

Classification of "VIVA MARIA" as "not suitable for young persons," thereby limiting the audience for the film (Section 46A-4; R. 125-127), resulted in direct and immediate injury to United Artists. Because the revenue derived by a distributor from the exhibition of its film is generally dependent upon box-office receipts (I. Ex. 1; R. 101, 146-147), the mandatory exclusion of a portion of the potential audience for a film undoubtedly has a detrimental financial impact upon the distributor. Moreover, since all subsequent runs would be subject to the same audience restriction, classification of a film as "not suitable for young persons" may also affect the distributor's ability to secure subsequent bookings for the film in question. Indeed, "VIVA MARIA" never enjoyed a subsequent run in the City of Dallas.

Notwithstanding United Artists' immediate and continuing constitutional interest in the unfettered exhibition of "VIVA MARIA," the City gave it no notice of any action taken or to be taken by the Classification Board with respect to "VIVA MARIA," did not join United Artists as a party defendant in the injunction proceeding after Interstate filed its timely notice of non-acceptance, and even resisted United Artists' intervention in such proceeding (R. 31-33). For, the ordinance does not accord any rights thereunder to the distributor of a motion picture. Proposed classifications of motion pictures may be filed only by exhibitors. (Section 46A-3(a); R. 124) Notice of classsification orders filed by the Board need be given only to exhibitors. (Section 46A-3(d); R. 125) Notices of non-acceptance may be filed only by exhibitors. (Section 46A-7(a); R. 128) Applications for reclassification of motion pictures previously classified may be filed only by exhibitors. (Section 46A-3(c); R. 124-125)[21] And in the event of a judicial proceeding, the City need join only an exhibitor as the sole defendant. (Section 46A-7(a)(1); R. 128-129) Moreover, if a distributor intervenes in a judicial proceeding by filing an Answer in Intervention, the City is fully entitled to seek

[21] Of course, even if the distributor could apply for reclassification of a film previously classified, which he cannot do under the Dallas Ordinance, this would not excuse the City's failure to recognize his interest in the initial classification proceedings. For, as Section 46A-3(c) makes clear, applicants for reclassification of a film previously classified must bear burdens they would not have had to bear as parties in the initial proceeding. See *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).

to have it stricken, since the distributor can remain a party only by judicial sufferance and not by right.[32]

This Court has repeatedly held that persons whose legal rights are to be determined by administrative or judicial proceedings are constitutionally entitled to notice thereof and an opportunity to be heard. See, e.g., *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Schroeder v. City of New York*, 371 U.S. 208, 211-214 (1962); *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314-315 (1950). See also: *Bantam Books, Inc. v. Sullivan*, supra, at 71. The Dallas ordinance's failure to require such notice and provide an opportunity for a distributor to be heard renders it void on its face.

That United Artists did, in this case, receive some informal notice of the City's suit against Interstate is obvious from its intervention therein. But such a happenstance can be no substitute for the due process requirement that the distributor of a motion picture be given direct, formal and specific notice of the date and nature of any proceeding vitally affecting its constitutional rights. *In re Gault*, 387

[32] Rule 60, Texas Rules of Civil Procedure, provides: "Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party; and such intervenor shall, in accordance with Rule 72, notify the opposite party or his attorney of the filing of such pleading within five days from the filing of same." Trial courts have wide discretion in determining what constitutes sufficient cause to strike an intervenor. See, e.g., *Mulcahy v. Houston Steel Drum Company*, 402 S.W. 2d 817 (Tex. Civ. App. 1966).

The Court of Civil Appeals at Dallas has already indicated its indifference to the right of a distributor to participate in proceedings under the ordinance (R. 171).

U.S. 1, 31-34 (1967); *City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 297 (1953).

Pragmatic constitutional considerations argue strongly for recognition in the Dallas ordinance of a distributor's First Amendment rights. For example, there may be instances in which an exhibitor proposes a classification of "not suitable for young persons," even though the distributor believes that the motion picture is "suitable for young persons." In all likelihood, the classification proposed by the exhibitor in such case will become effective (Section 46A-3(a); R. 124), thereby prohibiting the admission of persons under the age of 16 years to view the film and forcing all advertisements for the film to carry the legend "not suitable for young persons." The distributor would then have no recourse and could not contest the classification proposed by the exhibitor. Similarly, if an exhibitor for his own reasons should fail or by mere inadvertence neglect to file a notice of non-acceptance of a classification order entered by the Board, the Board's classification would become binding without any judicial determination that it is constitutionally permissible. Here, too, the distributor would be powerless to protest.

It is obvious that the interests of the exhibitor and the distributor may differ in these circumstances. The exhibitor who is prevented by the Board's classification from selling a few tickets may not sustain sufficient economic injury to induce him to seek vindication of his right to show the film without restriction. The distributor has the greater economic stake, because classification of a particular film

reduces his income from the exhibition of that film at every theatre within the City of Dallas at which it is shown, and may even result in the refusal of some theatres to show the film at all. Unless the distributor is accorded the right under the ordinance to notice and an opportunity to defend his motion picture, infringements of his First Amendment rights may too often go unremedied. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64n.6 (1963).

CONCLUSION

On each and every of the foregoing grounds, Appellant United Artists Corporation prays that said judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Dan McElroy, one of the attorneys for United Artists Corporation, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30 day of September, 1967, I served copies of the foregoing Brief of the Appellant United Artists Corporation on the following parties by depositing the same in the United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee City of Dallas and Appellant Interstate Circuit, Inc. at the following post office addresses, respectively:

1. To Appellee City of Dallas:

   Mr. N. Alex Bickley, City Attorney
   Room 501, Municipal Building
   Dallas, Texas 75201

2. To Appellant Interstate Circuit, Inc.:

   Mr. Grover Hartt
   Mr. Edwin Tobolowsky
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United Artists Corporation.

Dallas City Ordinance No. 11,284

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by adding thereto a new chapter known as Chapter 46A; Providing for the establishment of a Motion Picture Classification Board; Outlining classification procedures; Defining Offenses relating to the exhibition of films classified "Not Suitable for Young Persons"; Providing for the issuance, revocation and suspension of licenses; Providing for judicial review; Defining public nuisances; Providing for injunctive relief; Providing for an exception to State law; providing for a severability clause; Providing for a Penalty; Providing for the repeal of Ordinance No. 10963 enacted by the City Council on April 5, 1965, and enacting this ordinance in lieu thereof; and Declaring an Emergency.

WHEREAS, the City Council after investigation on the part of the members of said Council and the hearing of evidence and testimony at a public hearing called for that purpose, if of the opinion and finds that certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; and

WHEREAS, the City Council is of the opinion that legislative action should be taken by this Council for the pur-

pose of classifying the movies to which said young persons of school age are admitted without proper supervision; and

WHEREAS, the City Council is of the opinion and finds that a great portion of said movies are available for screening and for showing more than thirty days prior to their initial exhibition and that the benefits to the public will far exceed the burden placed upon the motion picture industry by having said movies screened and classified; and

WHEREAS, the City Council is of the opinion and finds that motion picture films possess a greater capacity for good and for evil among young persons of school age than most other modes of expression and are, therefore, affected with a public interest; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and is hereby amended by adding thereto a new chapter known as Chapter 46A, consisting of Section 46A-1 through 46A-11 inclusive, which shall read as follows:

CHAPTER 46A

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms

§ 46A-2 Establishment of Classification Board

§ 46A-3 Classification Procedure

§ 46A-4 Offenses

§ 46A-5 License

§ 46A-6 Revocation or suspension of license

§ 46A-7 Judicial Review

§ 46A-8 Public Nuisances

§ 46A-9 Injunctions

§ 46A-10 Exception to State Law

§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of

the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relation in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the films as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film

to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council.

Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order.

If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be ex-

hibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification

posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified as 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License:*

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license:*

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file an order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil

Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said mo-

tion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ

of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been

convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exemption to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable

as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

APPENDIX "B"

Section 46A-1. *Definition of Terms:*

(f) 'Not suitable for young persons' means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

An analysis of this Section shows that motion pictures can be classified on any of the following grounds:

Describing or portraying:	*If in the judgment of the Board there is a substantial probability that it will create the impression on young persons that such conduct is:*
1. BRUTALITY	1. Profitable
2. "	2. Desirable
3. "	3. Acceptable
4. "	4. Respectable
5. "	5. Praiseworthy
6. "	6. Commonly Accepted
7. CRIMINAL VIOLENCE	7. Profitable
8. " "	8. Desirable
9. " "	9. Acceptable
10. " "	10. Respectable
11. " "	11. Praiseworthy
12. " "	12. Commonly Accepted
13. DEPRAVITY	13. Profitable
14. "	14. Desirable
15. "	15. Acceptable
16. "	16. Respectable
17. "	17. Praiseworthy
18. "	18. Commonly Accepted
19. NUDITY BEYOND THE CUSTOMARY LIMITS OF CANDOR IN THE COMMUNITY	19. Profitable
20. "	20. Desirable
21. "	21. Acceptable
22. "	22. Respectable
23. "	23. Praiseworthy
24. "	24. Commonly Accepted
25. SEXUAL PROMISCUITY	25. Profitable
26. "	26. Desirable
27. "	27. Acceptable
28. "	28. Respectable
29. "	29. Praiseworthy
30. "	30. Commonly Accepted

Describing or portraying:	*If in the judgment of the Board there is a substantial probability that it will create the impression on young persons that such conduct is:*
31. EXTRA-MARITAL SEXUAL RELATIONS	31. Profitable
32. "	32. Desirable
33. "	33. Acceptable
34. "	34. Respectable
35. "	35. Praiseworthy
36. "	36. Commonly Accepted
37. *ABNORMAL SEXUAL* RELATIONS	37. Profitable
38. "	38. Desirable
39. "	39. Acceptable
40. "	40. Respectable
41. "	41. Praiseworthy
42. "	42. Commonly Accepted
Describing or portraying:	*If in the judgment of the Board it is likely that:*
43. NUDITY BEYOND THE CUSTOMARY LIMITS OF CANDOR IN THE COMMUNITY	43. Its *calculated or dominant* effect on young persons is *substantially* to arouse sexual desire.
44. SEXUAL PROMISCUITY	44. Same as 43.
45. EXTRA-MARITAL SEXUAL RELATIONS	45. Same as 43.
46. ABNORMAL SEXUAL RELATIONS	46. Same as 43.

APPENDIX "C"

PICTURES SUBMITTED AS "SUITABLE FOR YOUNG PERSONS" BUT EXHIBITED IN DALLAS AS "NOT SUITABLE FOR YOUNG PERSONS:"*

I.

Classification changed by exhibitor from "suitable" to "not suitable" after a request by the Board for screening or further information.

PSYCHO	Anthony Perkins, Vera Miles
WHERE LOVE HAS GONE	Susan Hayward, Bette Davis
ARRIVEDERCI, BABY	Tony Curtis
A FUNNY THING HAPPENED ON THE WAY TO THE FORUM	Zero Mostel, Phil Silvers, Buster Keaton
MISTER BUDDWING	James Garner, Jean Simmons
WHO'S BEEN SLEEPING IN MY BED?	Dean Martin, Elizabeth Montgomery
DOCTOR YOU'VE GOT TO BE KIDDING	George Hamilton, Sandra Dee
ADAM & EVE	Christiane Martel, Carlos Baena
HONEYMOON HOTEL	Robert Goulet, Nancy Kwan, Robert Morse
SUNDAY IN NEW YORK	Cliff Robertson, Jane Fonda
A NEW KIND OF LOVE	Paul Newman, Joanne Woodward
MADAME	Sophia Loren, Robert Hossein,
LOVE HAS MANY FACES	Lana Turner, Cliff Robertson
BOEING, BOEING	Tony Curtis, Jerry Lewis, Thelma Ritter
CADA NOCHE UN AMOR	

* According to the Classification Board minutes from January 14, 1966, through July 19, 1967, inclusive.

II.

Classification by the Board as "not suitable" after screening. No non-acceptance filed by the exhibitor:

SANDPIPER	Elizabeth Taylor, Richard Burton
A VERY SPECIAL FAVOR	Charles Boyer, Leslie Caron, Rock Hudson
THE LOVED ONE	Anjanette Comer, Jonathan Winters
LOVE WITH A PROPER STRANGER	Natalie Wood, Steve McQueen
I'LL TAKE SWEDEN	Bob Hope, Tuesday Weld
WORLD OF SUZIE WONG	Nancy Kwan, William Holden
AMOROUS ADVENTURES OF MOLL FLANDERS	Kim Novak, Richard Johnson
MONEY TRAP	Glenn Ford, Ricardo Montalban
THE NAKED PREY	Cornel Wilde
RASPUTIN, THE MAD MONK	Christopher Lee, Barbara Shelley
CINCINNATI KID	Steve McQueen, Edward G. Robinson
TORN CURTAIN	Paul Newman, Julie Andrews
NEVADA SMITH	Steve McQueen, Suzanne Pleshette
LADY "L"	Paul Newman, Sophia Loren, David Niven
GOLDFINGER	Sean Connery, Shirley Eaton
SECONDS	Rock Hudson, Salome Jens

THE SWINGER	Ann-Margaret, Tony Franciosa
WAY, WAY OUT	Jerry Lewis, Anita Ekberg, Robert Morley
THE PROFESSIONALS	Burt Lancaster, Claudia Cardinale
MOTHER GOOSE A GO GO	Joe Pyne, Brit Larsen
COVENANT WITH DEATH	George Maharis, Laura Devon
WHERE THE BULLETS FLY	Tom Adams, Dawn Addams
DON'T MAKE WAVES	Tony Curtis, Claudia Cardinale
WHAT'S UP TIGER LILY	Woody Allen, China Lee
TWO FOR THE ROAD	Audrey Hepburn, Albert Finney
WOMAN TIMES SEVEN	Shirley MacLaine, Alan Arkin
THE MILLION EYES OF SU MURU	Frankie Avalon, Shirley Eaton
GUIDE FOR THE MARRIED MAN	Walter Matthau, Robert Morse, Inger Stevens

III

Pictures classified as "not suitable" after trial by a district court of Dallas County:**

VIVA MARIA	Brigitte Bardot, George Hamilton, Jeanne Moreau
BLOOD AND BLACK LACE	Cameron Mitchell, Mary Arden
THE LIQUIDATOR	Rod Taylor, Jill St. John

** Additionally, THE SILENCERS, with Dean Martin, Stella Stevens and Daliah Lavi, was found to be "suitable" after a jury trial, but such judgment was set aside and a new trial granted on the City's motion. The case has not yet been retried.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

—v.—

THE STATE OF NEW YORK,

Appellee.

No. 64

UNITED ARTISTS CORPORATION,

Appellant,

—v.—

CITY OF DALLAS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

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IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

—v.—

THE STATE OF NEW YORK,

Appellee.

No. 64

UNITED ARTISTS CORPORATION,

Appellant,

—v.—

CITY OF DALLAS,

Appellee.

MOTION OF AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF, AMICI CURIAE

The American Civil Liberties Union, and its New York and Texas affiliates, move for leave to file a brief amici curiae in the two within cases. Attorneys for the parties in both cases, with the exception of the City of Dallas, have granted consent.

The American Civil Liberties Union is opposed to censorship in general, to film classification in particular as in No. 64, and to variable censorship standards depending on the age of the audience.

The statutes involved in the cases at bar are forms of prior censorship and thus violate the First Amendment. Although certain films and publications are thought by some members of the community to be unsuitable for children, it is up to parents, not governmental agencies, to decide what their children should see or read. Individual parents may heed the advice of various experts in determining what is good for their children, but they must be in the end be left free to accept or reject such advice as they see fit. The divergent views of parents on this subject are so numerous that it would be impossible for any official authority to formulate a consistently wise policy that could be applied to all children.

The practical effect of censorship for children is to lead producers and publishers to avoid censorable or controversial subjects designed for a wide audience, for many subjects—divorce, adultery, the intermixing of races—have been the target of censorship at some time. Thus free expression of opinion is inevitably discouraged.

The American Civil Liberties Union believes that its views on the constitutional problems involved in these cases will be of assistance to the Court and moves for leave to file the attached brief.

Respectfully submitted,

MELVIN L. WULF,
Attorney for Movants

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Interest of Amici

The interest of amici is set forth in the Motion for Leave to File this brief, *supra.*

Questions Presented

Whether Dallas City Ordinance No. 11,284 and Section 484-h of the New York Penal Law, which prohibit the exhibition of films and sale of books to minor children which are deemed, respectively, "not suitable for young persons" or "harmful to minors," violate the First and Fourteenth Amendments to the United States Constitution.*

ARGUMENT

I.

The statutes violate the First and Fourteenth Amendments because they are unconstitutional restrictions on freedom of speech.

Both statutes would be unarguably unconstitutional as a denial of First Amendment rights of both distributor and viewer were it not for the fact that they purport only to restrain dissemination of material to children. *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966) and *Butler* v. *Michigan,* 352 U. S. 380 (1957) clearly hold that protected materials may be withheld from the entire community because of their sexual content only if they are "utterly without redeeming social value," and may not be banned merely because they might offend young readers, listeners or viewers. These well-established principles are said not to apply under the statutes at bar, however, because they prohibit only distribution to minors.

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* The statutes are set out in full in the Appendix, *infra.*

The only justifications that might seriously be advanced for these statutes are (a) that children are not entitled to exercise substantial First Amendment freedoms or (b) that an overriding state interest justifies invading the publisher's right to speak and the child's right to hear. Neither justification withstands analysis.

This Court has not dealt at length with the extent to which the Constitution protects the right of minors to speak freely and to hear what they wish. In other areas, however, the Court has made it clear that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U. S. 1 (1967). *Gault* makes it crystal clear that the state may not, under the guise of according special protections aimed solely at minors, deny them the full protections of the Fifth and Sixth Amendments. And the power of the state to provide for and direct the education of children does not permit invasion of their right to enjoy the free exercise of religion or allow the imposition of religion. *School District* v. *Schempp,* 374 U. S. 203 (1963); *Engel* v. *Vitale,* 370 U. S. 421 (1962). Nor may the state force minors to utter words which offend their religious principles. *West Virginia Bd. of Education* v. *Barnette,* 319 U. S. 624 (1943).

It would indeed be inconsistent were minors to enjoy these freedoms but at the same time lose the right to think, speak, read and listen free of imposition of governmental censorship. In fact, this Court has already taken a much broader view. In dealing with the rights of children to resist the force-feeding of patriotic rituals, the Court has said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political con-

> troversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly . . . may not be submitted to vote; they depend on the outcome of no elections. *Barnette, supra,* at 638.

There is another more restrictive view of the First Amendment that could be proposed to justify broader censorship of material aimed at children than that disseminated in the adult community. Arguably, the purpose of permitting free expression is to allow society to make a rational choice among competing points of view; and it can plausibly be maintained that only adults should be allowed to do the choosing. This theory assumes that the average citizen is qualified to sort out and evaluate the ideas presented to him, but it does not assume that he can do so whatever his age. It assumes that a child cannot sort and evaluate, but will accept uncritically what he reads and hears.

> "This theory of the First Amendment is too narrow. It overlooks the obvious: that today's children are tomorrow's adults. Because a child will accept uncritically what he hears, he is to hear nothing but what the majority wants him to hear. Having heard, and by hypothesis accepted, nothing but orthodoxy all his life, he is suddenly to be transformed into a rational adult who will choose impartially in the marketplace of ideas. Surely this is too much to expect. Surely if we let any orthodoxy monopolize the minds of our children, we risk letting it control the future of our

society. The First Amendment, then, if its purpose is to preserve authentic competition among opinions, must protect expression to children as well as adults." Comment, 67 Colum. L. Rev. 1149, 1158 (1967) (footnotes omitted).

Thus, the First Amendment requires that children not be excluded from the full range of material which that Amendment is designed to protect. They too must have the freedom to enter the marketplace of political and cultural ideas. Material of redeeming social value cannot be withheld from minors without undermining the purposes of the First Amendment. The presence or absence of candid sexual portrayals may not be made the sole criterion of censorship, regardless of the age of the audience being sheltered. "The right of young persons to read what they will . . . is vital not only to them but to all our citizenry." *Police Comm'r* v. *Siegel Enterprises, Inc.*, 162 A. 2d 727, 731 (Md. 1960). In short, the First Amendment forbids the concept of variable obscenity incorporated in the statutes at bar. *Paramount Film Distrib. Corp.* v. *City of Chicago*, 172 F. Supp. 69 (N. D. Ill. 1959).

No valid state interest in the preservation of child welfare is at stake here which would justify overriding these substantial First Amendment goals. *Gault, Engel, Schempp* and *Barnette* all reject the notion that the governmental interest in child welfare is so overpowering, that First Amendment rights may be relaxed whenever a state sees fit to do so. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), lends no support to these statutes. That case extends no further than its specific facts. See *Prince* at 171. Moreover, the Court there was especially cognizant

of the dangers to young persons from "the crippling effects of child employment . . . and the possible harms arising from other activities subject to the diverse influences of the street." *Prince* at 168. It was the presence of this tangible and demonstrable evil that led the Court to justify governmental tampering with a tangential exercise of religious freedom, and the sweeping dicta concerning the state's power to protect child welfare *in loco parentis* must be read in the light of the historic dangers of child labor as well as later re-assessment of those dicta implicit in *Schempp* and *Gault*.

Here, the State of New York and the City of Dallas assert no tangible reason for these broad limitations on First Amendment freedoms. The Dallas ordinance itself suggests that its purpose is to prevent anti-social behavior, but there is no reputable evidence that candid sexual portrayals influence viewers to commit crimes.* In fact, the available evidence is to the contrary. A major conclusion of the careful study, Sex Offenders, published by the Kinsey Institute in 1965, is that so-called pornographic mate-

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* A series of monographs on children and the movies, published by the Payne Fund in 1933, include some studies purporting to prove that movies have a substantial influence on child behavior. Dr. Mortimer Adler has said these pamphlets exemplify "the worst . . . kind of work that is done today in psychology and the social sciences." Quoted in Moley, Are We Movie Mad? at 16 (1938). Adler was careful to point out that two or three of the studies were carried out fairly. These invariably failed to correlate movie attendance with anti-social action. Moley at 36-40. Adler's extensive critique of the Payne Fund work may be found in Adler, Art and Prudence (1937). The same conclusion is reflected in a recent federal statute, Pub. L. No. 90-100 (October 3, 1967), creating a Commission on Obscenity and Pornography. Section 5(a)(3) states that one of the major purposes of the Commission is "to study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other anti-social behavior."

rials are not a factor in the causation of sex offenses. Discussing the work of the country's foremost experts on juvenile delinquency, Sheldon and Eleanor Glueck, one commentator has observed that they

> "... have consistently traced anti-social behavior traits to the individual's physical constitution and home environment, rather than movies and books. '[O]ne does not get at the basic problems presented by the energetic, adventure-thirsty mesomorphic lad by taking movies or comics away from him. If he has a need for such outlets he will somehow get to them; and *deprivation is no cure.*' It appears that anti-social traits are developed at an extremely early age, before the child is capable of intelligent comprehension of films. In developing yardsticks for predicting juvenile delinquency, no reliance is placed on the individual's entertainment material." Comment, 67 Colum. L. Rev. 1149, 1154-55 (1967) (footnotes omitted). See also Id. at note 47.*

Neither statute contains any suggestion that its impact is limited to those authors who attempt to exploit curiosity in sex for commercial gain. In fact, the facts underlying each of these cases thoroughly disprove that notion. Nor, in the face of *Engel, Schempp,* and *Barnette,* can it be main-

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* Other authors have reached the same conclusion. See *Roth* v. *United States,* 237 F. 2d 786, 802 (2d Cir. 1956) (dissenting opinion Frank, J.), aff'd 354 U. S. 476 (1957); Murphy, The Value of Pornography, 10 Wayne L. Rev. 655 (1964); Cairns, Paul & Wishner, Sex Censorship: The Assumptions of the Anti-Obscenity Law and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); Green, Obscenity, Censorship and Juvenile Delinquency, 14 U. Toronto L. J. 229, 234 (1962); Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963).

tained that the state's powers of education are sufficient to justify these measures.

In sum, one cannot say what evil it is that Dallas and New York are attempting to control with such legislation, other than penalizing speech which is thought to be immoral or the medium of impure ideas—an objective that is clearly impermissible. See *Kingsley Pictures* v. *Board of Regents*, 360 U. S. 684 (1959).

Proponents of the statutes at bar are unable to produce a tenable constitutional principle that would validate age classification censorship on the basis of sex content and which at the same time would save from constitutional invalidity censorship designed to prevent children from seeing, reading or hearing materials governmental officials deem offensive. There is no principled distinction between these forms of censorship and the variable obscenity concept. Analytically, each has an equal claim to validity under the Constitution. The First Amendment demands that each be declared invalid.

II.

The statutes are unconstitutionally vague.

The void-for-vagueness doctrine requires that statutes be sufficiently specific so that a person may reasonably predict whether his intended behavior will bring him within the restrictions and sanctions imposed by the law. Stricter vagueness criteria are applicable to statutes infringing on freedom of speech, *Smith* v. *California*, 361 U. S. 147, 150-52 (1959), because considerations beyond the individual interest in fair notice are present. Moreover, "the fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts." *Times Film*

Corp. v. *City of Chicago,* 365 U. S. 43, 75 (1961) (dissenting opinion of Warren, Ch.J.).

Censorship standards classified by this Court as too vague include "sacrilegious", *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); "of such character as to be prejudicial to the best interests of the people", *Gelling* v. *Texas,* 343 U. S. 960 (1952); "on account of being harmful", *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587 (1954); "immoral" and tending "to corrupt morals", *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954); and "obscene, indecent, immoral, inhuman, sacrilegious," or "would tend to corrupt morals," *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684 (1959).

In the light of past decisions, the Dallas statute is hopelessly vague. Its terms are at least as devoid of meaning as those set forth above. By making the legality of speech depend upon the whimsical opinion of a board of citizens, the Dallas statute sets the censors "adrift upon a boundless sea amid a myriad of conflicting . . . views, with no charts" to guide them. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 504-05 (1952). Censorship based on the belief that material is "likely to incite or encourage delinquency" clearly runs afoul of the doctrine of *Winters* v. *New York,* 333 U. S. 507 (1948), which held unconstitutionally vague a book censorship statute forbidding "the massing of stories of . . . lust in such a way as to incite crime against the person." Id. at 514. In fact, "the judgment of the Board" relied upon by the Dallas statute is more than vague; it is nonexistent. No judgment is rendered until the publisher has already acted. How is he to conform his behavior to the future whims of persons unknown to him? What does it mean to advise a film producer that his work will be banned on the theory that it is likely to encourage

sexual promiscuity if a local censorship board feels there is a "substantial probability" that it will give young persons the "impression" that "sexual promiscuity" is "profitable" or "desirable"? By what standards does a court review a determination that "in the judgment of the Board" the "dominant effect" of a film is "substantially" to "arouse sexual desire"?

The unintelligible vagueness of the New York statute has been conceded by a proponent of age classification censorship. He notes that the statute contains "all the words that hardly any two judges seemed to have been able to interpret alike, . . . peppered liberally with the words 'for minors' ": R. Kuh, Foolish Figleaves? 251 (1967). How is the average bookseller to discover the "prevailing standards in the adult community . . . with respect to what is suitable material for minors" or what constitutes "redeeming social importance for minors"?

Furthermore, failing to delineate in precise terms what booksellers and film producers may or may not do will discourage those who are cautious or unable to afford litigation from selling materials to minors that the law was not in fact intended to proscribe. These statutes will inevitably result in a broader scope of actual censorship than any court would wish to permit.

Validation of these statutes will also result in more than excessive self-censorship. Official censorship itself, when limited by terms as imprecise as these, is certain to exceed the limits intended by any court or legislature cognizant of the First Amendment values at stake here. One commentator has concluded, after a thorough survey of eight motion picture censorship boards, that "[t]he basic problem with motion picture censorship is that wherever

it is put into practice it flouts the supreme law of the land day after day and year after year." Carmen, Movies, Censorship and the Law 244 (1966). "Granting further latitude to the censors is certain to multiply the horrors already perpetrated by those institutions of official dogma. We do not know what [materials] may be suppressed in the name of child welfare—but the works of Hemingway, Salinger, Moravia, Maugham, Dumas, Voltaire, de Maupassant, Tolstoy, Zola and Freud have been officially deemed unfit for adults in the past." Comment, Exclusion of Children From Violent Movies, 67 Colum. L. Rev. 1149, 1168 (1967) (footnotes omitted). See also Id. at 1167, n. 107; Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 890 (1963).

The dangers inherent in the administration of vague censorship statutes are fully present in both cases under consideration here. In Dallas, an official board performs the censorship function; in New York, it is the police. Nor is the Dallas statute saved by the provision for judicial review. The judge applies the same standards utilized by the Board* and the producer and distributor can avoid criminal sanctions only by suffering censorship. Surely the right of persons to be free from penalties imposed by vague criminal censorship statutes cannot vary with the audience sought to be restricted; it is their rights, not those

* The fact that "the judgment of the Board" is an indispensable prerequisite to a finding, under the Dallas ordinance, that a film is censorable inevitably leads to the conclusion that the statute fails to meet the standards of *Freedman v. Maryland*, 380 U. S. 51 (1965). That case requires de novo judicial review of all acts of any film censorship board. The standards of the Dallas ordinance reduce the judge's function to determining whether the Board's adjudication was an abuse of discretion. No court can make a de novo finding of whether or not a film is, *in the judgment of the Board*, likely to incite young persons to anti-social behavior.

of their audience, that the void-for-vagueness doctrine is intended to protect.

Where First Amendment rights are being infringed, one will not be heard to argue that it is better to cope with the difficulties and irrationalities of administration than to have no law at all.

CONCLUSION

For the reasons stated above, the convictions should be reversed.

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The attorneys for amici are grateful to Mr. Thomas G. Krattenmaker, third year student at Columbia Law School, for his invaluable assistance in preparation of this brief.

APPENDIX

Statutes

DALLAS CITY ORDINANCE NO. 11,284

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms
§ 46A-2 Establishment of Classification Board
§ 46A-3 Classification Procedure
§ 46A-4 Offenses
§ 46A-5 License
§ 46A-6 Revocation or suspension of license
§ 46A-7 Judicial Review
§ 46A-8 Public Nuisances
§ 46A-9 Injunctions
§ 46A-10 Exception to State Law
§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their

action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the

Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in

the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons.'

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified as 'not suitable for young persons.'

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified 'not suitable for young persons.'

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified 'not suitable for young persons.'

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License*:

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license*:

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suit-

able for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file and order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review*:

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such

defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and

shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said motion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if

the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for a new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after

the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances*:

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to

use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions*:

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exception to State Law*:

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause*:

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor

and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

New York Penal Law*

§ 484-h. EXPOSING MINORS TO HARMFUL MATERIALS

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with

* The equivalent statute in the 1967 revised Penal Law is contained in Sections 235.20-235.22.

less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse, and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. Sept. 1, 1965.

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No. 64

In the

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,
Appellant,

v.

CITY OF DALLAS,
Appellee.

OBJECTION TO THE MOTION OF AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION AND TEXAS CIVIL LIBERTIES UNION AND THE AUTHORS LEAGUE OF AMERICA, INC., FOR LEAVE TO FILE BRIEFS AMICI CURIAE

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WARLICK PRESS, INC.—P. O. BOX 10543—2263 VALDINA STREET—DALLAS—ME 1-3130

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The City of Dallas as Appellee did withhold its consent to the American Civil Liberties Union and its New York and Texas affiliates, and to the Authors League of America, Inc., to file briefs Amici Curiae in this cause. This was done under the Rules of the Supreme Court of the United States which were adopted June 12, 1967, to become effective October 2, 1967. The gist of these rules is, and particularly of Rule 42, that the purpose of brief amicus curiae is to:

> "* * * set forth facts or questions of law that have not been, or reasons for believing that they will not

adequately be, presented by the parties, and their relevancy to the disposition of the case; * * *"

The Appellant United Artists Corporation, in Cause No. 64, and the Appellant Interstate Circuit, Inc., in the companion Cause No. 56, have each been and are represented by competent counsel. They have raised, analyzed and urged upon the Court the Constitutional questions that are presented by the case. They have carefully and painstakingly analyzed the decisions of the Court and applied them to this case. It is to be noted that none of the movants in their motions comply with Rule 42 of the Rules of the Supreme Court of the United States in that they do not state any reasons for believing that the Constitutional questions will not "adequately be presented by the parties," and therefore have shown no reason for being in the case other than the fact that they are interested in the decision. If the Court allows every party interested in the decision to file a brief amicus curiae, the burden would be without end.

In conclusion, the Appellee has withheld its consent because:

(1) There has been no showing that the Constitutional questions are not adequately presented by counsel before the Court.

(2) There has been no showing of any new Constitutional question sought to be raised by the movants.

(3) The interest of the movants is no greater than that of the public at large and of many other organizations.

(4) To allow the filing of the briefs will do nothing but clutter the record and add nothing to the Court's opinion.

For these reasons, the Appellee believes that the views of these organizations will be of no assistance to the Court and renews its objection to the filing of their briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Objection to Motion of Amici Curiae has been served upon Mr. Dan McElroy and Mr. Paul Carrington, attorneys for Appellant-Intervenor, United Artists Corporation, by delivering same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas, and to Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them at their offices located at 3525 Southland Center, Dallas, Texas; and to Mr. Irwin Karp, 120 Broadway, New York, New York, 10005, Attorney for The

Authors League of America, Inc., Amicus Curiae, by depositing same in the United States Mail; and to Mr. Osmond K. Frankel, 120 Broadway, New York, N. Y., 10005; Mr. Edward J. Ennis, 8 West 40th Street, New York, N. Y. 10018; Mr. Melvin L. Wulf and Mr. Alan H. Levine, 156 Fifth Avenue, New York, N. Y. 10010, and Mr. Fred O. Weldon, Jr., 1601 National Bankers Life Building Dallas, Texas, 75201, Attorneys for Amici Curiae, The American Civil Liberties Union, New York Civil Liberties Union, and Texas Civil Liberties Union, by depositing same in the United States Mail.

N. Alex Bickley

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No. 64

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OCTOBER TERM, 1967

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APPELLEE'S BRIEF IN ANSWER TO BRIEF SUBMITTED BY AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

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APPELLEE'S BRIEF IN ANSWER TO BRIEF SUBMITTED BY AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

The Dallas Motion Picture Classification Ordinance is not a form of prior censorship as that term has been used and defined by the Supreme Court. This Appellee agrees that in the final analysis a child's parent should decide what their children should see or read. The Dallas Ordinance, when properly interpreted and understood, is basically an aid for parents. The Ordinance simply requires that those movies containing material which is harmful for children shall be advertised as "not suitable for young persons". Of course, this Appellee does not believe that a producer or

artist is so dominated by the profit motive, i.e., primarly concerned with taking money from children fifteen (15) years old and under, that he would prostitute his principles and cease to create as his creative ability dictated.

QUESTION PRESENTED

Whether the Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11284, which deals with the classification of adult motion pictures as "not suitable for young persons", is proper legislation within the terms of the First Amendment to the United States Constitution.

ARGUMENT

I.

The Dallas Motion Picture Classification Ordinance does not violate the First and Fourteenth Amendments because it follows the law as laid down by the United States Supreme Court.

Three short years ago in 1964, the United States Supreme Court set forth the policy and laid the foundation for legislation, such as the Dallas Motion Picture Classification Ordinance, in its opinion in *Jacobellis v. Ohio,* 378 U.S. 184. Although the case dealt with whether or not the motion picture "The Lovers" was obscene, this Court in that case stated that it recognized the problem of disseminating harm-

ful material to children and went on to recommend a solution. The Court stated at page 195:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. * * * State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. * * *"

In the *Jacobellis* case the Court stated that the State's interest in its children would not justify total suppression of material harmful to children so as to "reduce the adult population * * * to reading only what is fit for children." The Court here was following its earlier decision in *Butler v. Michigan*, 352 U.S. 380. It is patently clear that the Dallas Classification Ordinance avoids this pitfall because it does not totally suppress, prohibit or attempt to alter in any fashion any motion picture. Quite simply, the Dallas Ordinance requires that adult entertainment be labeled as such.

Amici Curiae based a large portion of their brief upon a law comment (unsigned) appearing in 67 *Columbia Law Review* (1967). A portion of the quotations relied upon apparently are those comments of a writer whose background is unknown and whose expertise as to what a child will or will not accept, certainly cannot be evaluated. It is a well written article in many aspects, but Amici Curiae fail to point out to the Court that even in this article, which

attempts to show that there should be no classification insofar as children are concerned, there are admissions that the views of the writer may not be that of the Court:

> "One of the three attributes of obscenity, as the Supreme Court has defined it, is that it must appeal to the prurient interest; it seems reasonable to suppose that some material will have prurient appeal for children, though not for adults. This may be the basis for the Supreme Court dicta just summarized; in any event, these dicta make it probable that the Court will accept age classification censorship for obscenity. * * *" page 1157 (Footnotes omitted)

It also points out that the profit motive of the producer may be a far greater overriding factor than is the promulgation of a new idea in the abstract. This is evidenced by the statement that:

> "* * * Although exclusion of children from movies theoretically results in no total suppression of the content of the expression, age classification will force producers and exhibitors either to restrict the content of their films or to accept revenues potentially far below average, for minors constitute the largest group of film-goers in the country. * * *" page 1158 (Footnotes omitted)

This Appellee can find no Court or responsible authority, which would advance the idea or principle that children should be held to the same standard of maturity and reason as adults, and indeed not even the Appellants or Amici Curiae have attempted to do so.

It is respectfully urged that a proper understanding of the purpose of the First Amendment and the rights for which it was designed to protect reveals no improper con-

flict with the Dallas Motion Picture Classification Ordinance. The First Amendment was designed to protect a man's right to express his ideas, no matter how unpopular, by whatever means he chooses, including motion pictures. It should be remembered that this Classification Ordinance does not attempt to tamper with the work product of any writer, artist or producer. The Ordinance in no way interferes with the distribution of motion pictures. The Ordinance allows local exhibitors of motion pictures to exhibit any and all motion pictures; but the Ordinance does require that adult entertainment be labeled as such, and it attempts to regulate the conditions under which a child under the age of sixteen (16) years may view material found to be "not suitable for young persons".

Of course, this Court is well aware of the tremendous rise in recent years of juvenile delinquency and the rising crime rate, particularly crimes committed by this Nation's young people; it has appalled all persons who are honestly concerned with this Nation's well being. *(In re Gault*, 387 U.S. 1) Our leaders, both national and local, have again and again expressed deep concern and have urged responsible persons to seek solutions to this problem.

The City Council of the City of Dallas, after much investigation and deliberation, found that motion pictures had a definite effect on a child's behavior, and that many of today's motion pictures had a detrimental effect. It is admitted that motion pictures are not the only influences upon a child, but most authorities agree that motion pictures have a substantial effect on a child's behavior, as did

this Court in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, when this Court stated that motion pictures can possess a greater capacity for evil than other modes of expression.

Amici Curiae seem to contend that a child should properly be exposed to the same kinds of material and entertainment as adults, and the only possible conclusion that can be drawn from such a contention is that children have the same ability and maturity to judge and decide as adults. This thinking would be hard to reconcile with the many, many laws which make distinctions based on age, for example laws dealing with: obtaining a driving license, buying or selling liquor or other alcoholic beverages, child labor, the capacity to contract, voting, holding political office, responsibility for negligence, and certain crimes. The medical profession has determined that certain drugs may be taken by adults but not children. To the argument that the matters listed above deal with the physical well being of a child, this Appellee would strongly and sincerely argue that a child's mental well being is at least as important as his physical well being. Shall we protect a child's body and ignore his mind? Does the state have a responsibility for the child's mental well being?

The Amici Curiae state that only material which would be obscene to adults, as that term has been defined by this Court, should not be disseminated to children. The obscenity test as set forth by this Court from *Roth v. United States*, 354 U.S. 476, to *A Book, Etc. v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413, *Ginzberg v. United States*, 383 U.S. 463, and *Mishkin v. State of*

New York, 383 U.S. 502, vividly demonstrates an extremely hard test, and properly so. It would seem ludicrous to seriously contend that children should be freely exposed to all material except material which is so blatantly vile and worthless that it is excluded from adults. Amici Curiae fail to recognize that a motion picture, or other material, may have some redeeming social value that can be appreciated by an adult but which cannot be appreciated by a child, and is therefore of no value to him.

Although Amici Curiae do not agree with the principle of "variable obscenity", prior decisions of this Court and the lower Courts have indicated that this principle is proper. *Jacobellis v. Ohio, supra, Butler v. Michigan, supra, Ginzberg v. United States, supra, Mishkin v. State of New York, supra, Interstate Circuit, Inc., et al v. City of Dallas*, 366 Fed. 2d 590, *In Re Louisiana News Company*, 187 F. Supp. 241.

This Court has consistently recognized the valid State interest in its children's welfare, *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158. Juvenile crime and delinquency create a social problem which commands state concern. Many motion pictures misrepresent reality and portray anti-social behavior as if it were the accepted mode of conduct. Children without proper guidance can be, and have been, misled and improperly influenced by such presentations through the motion picture media. Many responsible producers, distributors and exhibitors of commercial motion pictures have themselves classified certain movies as "adults only" in Dallas and other cities through-

out the county.* They realize that certain films are adult entertainment and were intended as such, and they do not seek to exploit the children. It is extremely unfortunate that all movie producers are not as responsible.

It should be remembered that the Dallas Ordinance provides that any child may see any motion picture, but when viewing a motion picture that has been classified as "not suitable for young persons", the child must be accompanied by his parent or guardian. This provision is very important to the value of the Dallas Ordinance. If a parent feels his child is mature enough to receive social value from viewing an adult film, he may accompany his child, and the child will receive the benefit of parental guidance.

The "tangible and demonstrable evil" that Amici Curiae seek to find regarding this Classification Ordinance is simply the misrepresentation of accepted conduct presented so as to impress upon the young people that such portrayals are proper social behavior. Although we assume that most adults are mature enough to accept or reject these portrayals as they see fit, many, many young persons are impressed by such portrayals and are stimulated to imitate what they see because of the attractive manner of presentation.

It goes without question that juvenile delinquency is a social evil. The City Council of the City of Dallas deter-

* In some instances the contractual arrangements between the producer, distributor and exhibitor impose its own regulation, e.g., exhibitors throughout the United States were prohibited (by the producer) from allowing anyone under the age of 18 years to view such movies as "Who's Afraid of Virginia Woolf?" and "Ulysses". This is an obvious example that the movie industry itself feels that certain movies are not suitable for viewing by children.

mined that one of the contributing factors was the false impressions received through the motion picture media, and the Council sought a solution. The Dallas Motion Picture Classification Ordinance was its answer. It allows complete free expression and dissemination of material and ideas. It does not seek to curb anyone's creative thinking. It does seek to control the conditions under which a young person is exposed to adult entertainment, and as such, would offer some restraint to the exploitation of the young and immature.

Amici Curiae have no solution and propose none except to apply the same standards to a minor that they would to an adult insofar as the material content of movies is concerned. Even the movie industry itself has not gone this far. They have established certain movie houses where movies "for adults only" are shown. It is true that the burden of proof on the City is onerous. Because a problem is difficult, it should not deter the City from attempting a solution thereof, if public interest requires a solution. It is our feeling that this is such a problem. Once the germ of sexual perversion or criminal violence is ingrained in the young person's mind and then is repeated on many occasions with attractive packaging, it becomes a part of the many items which make up that individual's character. Maybe subsequent delinquencies or criminal tendencies cannot be directly contributed to the one factor, but if it, among other factors, comprises the bundle which causes that delinquency or criminal tendency, then the public should be concerned with it. Certainly the writers of the Constitution did not intend that

the State could not protect its young persons against such an invideous mental suggestive procedure.

II.

The Dallas Motion Picture Classification Ordinance is valid and sufficiently definite under constitutional requirements.

Amici Curiae argue that the Dallas Motion Picture Classification Ordinance is void because the standard for classifying motion pictures is too vague. The classification standard of the Dallas Ordinance, City of Dallas Ordinance No. 11284, is set out in Section 46A-1 (f), wherein the term "not suitable for young persons" is defined. (Amici Curia Brief, Appendix, Page 16).

To this argument this Appellee would simply request this Court to note that the language used in the Dallas Ordinance to define motion pictures, which are "not suitable for young persons", in most part is taken from opinions written by this Court. A good part of this definition tracks the Court's own definition of obscenity with the only modifications being those necessary to adopt that definition to classifying motion pictures for young persons.

If we would accept the argument of Amici Curiae, it would be impossible to have adequately sufficient standards for classification. This position is contrary to the Court's decision in *United States v. Petrillo*, 332 U.S. 1. It is obvious that Amici Curiae's assertion that the Classification Board is allowed to depend upon "whimsical opinion" is without

merit, and it is easily demonstrated by simply reading the definition of "not suitable for young persons".

Far from being adrift without any chart for its course, the Ordinance sets out the guide lines for each Board member to follow. It is not a matter of personal tastes or personal likes, but it is language that has been used by this Court on numerous occasions. It is incumbent upon the Board to interpret the Ordinance in the light of the decisions handed down by this Court. If the guide lines are hazy, the opportunity is now presented to this Court to make them clear and concise.

In addition to the Classification Board's judgment concerning a motion picture, the Motion Picture Exhibitor is entitled to a speedy judicial determination as to whether or not the particular movie in question is in fact "not suitable for young persons". If an exhibitor disagrees with the Classification Board, the City of Dallas has the burden of proving in a court of competent jurisdiction that the particular film is "not suitable for young persons". If the City of Dallas fails to perform this burden within ten (10) days, i.e., obtain said judicial determination, the motion picture may be shown without classification. It seems abundantly clear that a reasonable man, particularly one as well versed and intelligent as producers, distributors and exhibitors of motion pictures, would have little trouble understanding the classification standard.

It must be remembered that the Dallas Ordinance is not a censorship ordinance. It does not tamper with the work product of a creator of motion pictures. Censorship con-

notates either total suppression, prohibition of material or a deleting of a portion of the material. To urge that a film producer will not produce a film under the overriding influence of the Dallas Classification Standard, is to admit that the producer is more interested in obtaining profits from admission fees of children than in making a motion picture in accordance with the dictates of his ideas.

Amici Curiae have misunderstood the judicial review provided by the Dallas Classification Ordinance. The motion picture exhibitor is provided a speedy de novo judicial determination. If he wishes, he may have a jury. The Judge and/or jury makes an independent judgment as to whether or not the particular motion picture is in fact "not suitable for young persons". In this particular case, involving the motion picture "Viva Maria", in addition to the judicial determination by the District Judge, the Texas Court of Civil Appeals viewed the movie in its entirety and found that it was in fact "not suitable for young persons". It should also be remembered that this judicial hearing was a civil proceeding rather than criminal.

The Court should at all times keep in mind that the Dallas Ordinance provides first for the classification of the movie. This is a matter that involves the determination of the Board, which is a civil matter, and any court proceedings regarding a classification is also a civil matter. The burden of proof is completely upon the City to establish the classifi-

cation. It is only after the classification is established in the civil court that any criminal or misdemeanor action can actually be taken, and even this is of a minor nature, being that of a fine only. This means that the producer and exhibitor do not have to look to the classification standard in the Ordinance to determine whether or not there will be a misdemeanor violation. This is not a matter of vagueness—it is a matter of absolute knowledge on their part. This applies before any misdemeanor charge is filed.

Amici Curiae are incorrect in requesting that this Court reverse *convictions* in this case as it pertains to the City of Dallas and United Artists Corporation and Interstate Circuit, Inc., because, as stated above, this is not a criminal case.

This Appellee would urge the Court to balance the substantial public interest in protecting its young persons against the very minimal effect on the First Amendment. We would respectfully request that this Court weigh the public interest against the private interest of the movie industry as it has done in the past. *Breard v. Alexandria,* 341 U.S. 622; *American Communications Association v. Douds,* 339 U.S. 382; *Barenblatt v. United States,* 360 U.S. 109; *Wilkinson v. United States,* 365 U.S. 399; *Braden v. United States,* 365 U.S. 431; *Konigsberg v. State Bar of California,* 366 U.S. 36, and *Kovacs v. Cooper,* 336 U.S. 77.

III.

CONCLUSION

Based upon the foregoing reasons, Appellee prays that said judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, be affirmed.

Respectfully submitted,

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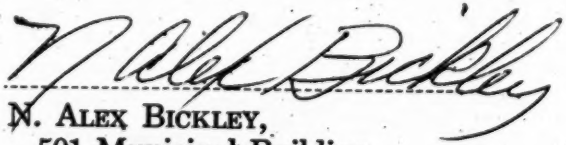
CERTIFICATE OF SERVICE

A copy of this brief in answer to the brief of Amici Curiae has been served upon Mr. Dan McElroy and Mr. Paul Carrington, attorneys for Appellant-Intervenor, United Artists Corporation, by delivering same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas, and to Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them at their offices located at 3525 Southland Center, Dallas, Texas; and to Mr. Irwin Karp, 120 Broadway, New York, New York, 10005, Attorney for The Authors League of America, Inc., Amicus Curiae, by depositing same in the United States Mail; and to Mr. Osmond K. Frankel, 120 Broadway, New York, N. Y., 10005; Mr. Edward J. Ennis, 8 West 40th Street, New York, N. Y., 10018; Mr. Melvin L. Wulf and Mr. Alan H. Levine, 156 Fifth Avenue, New York, N. Y., 10010, and Mr. Fred O. Weldon, Jr., 1601 National Bankers Life Building, Dallas, Texas, 75201, Attorneys for Amici Curiae, The American Civil Liberties Union, New York Civil Liberties Union, and Texas Civil Liberties Union, by depositing same in the United States Mail.



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OCT 30 1967 SUPREME COURT, U. S.

No. 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

Appellant,

—v.—

CITY OF DALLAS,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1967

No. 64

UNITED ARTISTS CORPORATION,

Appellant,

—v.—

CITY OF DALLAS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America, Inc. respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding.

The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases inolving the rights of free speech and press. Because determination of the issues involved in this case will significantly affect those fundamental rights, the Authors League respectfully applies for leave to file its brief *amicus curiae.*

Counsel for the Applicant is familiar with the questions involved in this case, and the scope of their presentation, and believes that there is necessity for additional argument on the points specified in the League's *amicus* brief.

The Authors League respectfully submits that this appeal presents a threshold Constitutional issue which precedes those involving the substantive and procedural defects of the Dallas ordinance. In its brief the Authors League urges that a local ordinance regulating the exhibition of a motion

picture is, per se, a violation of its producer's freedom of speech and press, and right to Due Process. We believe that the arguments on this point, in the League's brief, are germane to this appeal.

The League's brief also contends that the Ordinance is defective for failure to provide adequate safeguards to the exhibitor who admits a child under age through mistake or the child's misstatement of his age. Finally, the brief urges that if a departure is made from present *Roth* Standard, when defining obscenity for children, that the Court adopt a definition based upon Mr. Justice Stewart's description of "hard-core pornography" in *Ginzburg* v. *United States*, 383 U. S. 463. This would be easier to apply and less likely to produce unconstitutional restraint than would a concept of "variable obscenity" or variable "prurient interest." The Authors League believes that the discussion of these points in its brief may contribute to the consideration of the fundamental issues posed by this appeal.

Counsel for the Authors League has been advised by Appellant's attorneys that they have no objection to the filing of the within brief *amicus curiae*. Counsel for Appellee has advised the League's attorney that he does object to the filing of the brief.

Because the Authors League of America believes that the issues involved here are of vital concern to writers as well as motion picture producers and exhibitors, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae

IN THE

Supreme Court of the United States

October Term, 1967

No. 64

UNITED ARTISTS CORPORATION,

Appellant,

—v.—

CITY OF DALLAS,

Appellee.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AS *AMICUS CURIAE*

Introductory Statement

The Authors League believes that this appeal raises issues of vital concern to authors, publishers and others concerned with preserving freedom of speech and press. We submit that the Dallas ordinance, in substance and in its procedural requirements, infringes those rights. But we also believe that the ordinance violates the First Amendment in two other important respects. It denies the creator of a motion picture the right to defend his freedom of speech. And, because it is a local ordinance, it is *per se* an unconstitutional restriction on free speech and press (regardless of its terms). We believe that the problem of multiple regulation of freedom of speech, and the restrictive effects inherent in such a system, is one of the most serious challenges to First Amendment freedoms.

POINT I

A local ordinance regulating the exhibition of a motion picture, per se, violates its producer's constitutional freedoms of speech and press, and right to due process.

We respectfully submit that a city, town or other political subdivision of a state cannot impose any regulation—including classification—upon the exhibition of a motion picture to adults or children, without thereby infringing the producer's constitutional rights of free speech and press under the First Amendment; and his right to due process of law under the Fourteenth Amendment.

Such a violation occurs even if the regulation might, in substance and procedural safeguards, be constitutionally proper when adopted by the state itself. (For reasons indicated below, Point III, we believe that the Dallas ordinance is also constitutionally defective in substance and procedural safeguards.) Local-option regulation of motion pictures permits a system of multiple restraints that would effectively destroy the producer's right of free speech in many areas, although his motion picture was entitled to First Amendment protection.

Underlying this contention are three premises: (i) the producer's right of free speech is endangered by local regulatory ordinances; (ii) he is entitled to defend against them, even when they are directed at exhibitors; (iii) adverse classifications for children restrict his right of free speech. We discuss these first.

(i) The Producer's Right of Free Speech Is At Stake.

Although the Dallas ordinance, by its terms, applies to local exhibitors, it unquestionably affects the First Amend-

ments rights of each producer whose motion pictures are shown in Dallas; and the distributors who circulate them. As this Court noted in *Bantam Books* v. *Sullivan,* 372 U.S. 58, 64, n. 6 (1963), freedom of the press protects circulation, as well as publication, of books; and the direct result of a restrictive regulation aimed at local book stores is curtailment of the publisher's right of freedom of press.

The same causal relationship, and restrictive effect upon the producer's constitutional rights, exists here. His freedom to speak, to make and communicate his motion picture to the public, can be curtailed by restricting his right to have it circulated, through a burdensome system of restraints—ostensibly aimed at local exhibitors who are the essential link in his chain of communication to the public.

(ii) The Producer Is Entitled to Defend Against Such Regulatory Ordinances.

In *Freedman* v. *Maryland,* 380 U.S. 51 (1965), as in *Bantam Books* v. *Sullivan, supra,* the Court recognized that a producer is entitled to defend his constitutional rights against statutes which restrict them by limiting local exhibition of his motion picture.

(iii) An "Unsuitable" Classification Restricts the Producer's Right Of Free Speech.

A classification of "unsuitability" for children restricts a producer's rights, whether it is imposed after contest—or by default (attributable to onerous burdens of compliance, or of contesting adverse board actions).

If the motion picture is constitutionally protected for viewing by children, its producer's right to have it exhibited to them is restrained by the board's improper classification "not suitable for young persons." The label also

impairs his right to have it exhibited to adult audiences. The local exhibitor may refuse to show it at all, once it is labelled "unsuitable," for fear of risking community pressures, or fear of penalty if he inadvertently admits an under-age child. Moreover, some adults within the community may accept the adverse label as evidence of immorality or impropriety which would keep them from seeing the picture.

Equally important, adverse classification restricts not only the rights of the producer, the distributor and local exhibitor—but also the rights of children and adults who wish to see the picture, or have their children see it, and are thus denied the opportunity because of improper classification. (Cf. *Lamont* v. *Postmaster General,* 381 U.S. 301, 308.)

(iv) A Local Ordinance Regulating Motion Picture Exhibition is Per Se Unconstitutional.

The producer's constitutional right to have his motion picture exhibited can be seriously impaired, if not totally destroyed, if regulations affecting that right—including classification—can be imposed by governmental subdivisions below the State level. The door would then be open for a system of multiple restraints which could effectively prevent the producer from contesting adverse decisions, or coerce him into accepting them—even assuming each regulation was in form and substance, constitutional.

What Dallas can do, other cities and communities can do. Even if classification regulations were adopted only by Texas cities with populations in excess of 50,000, a producer would have to comply with some twenty separate regulations, and face the prospect of twenty separate injunction proceedings, if all the boards issued an "unsuitable" classi-

fication for a given picture. If more Texas cities decided to adopt ordinances the producer would have dozens of regulations to comply with, and suits to contend with, on any one picture. It would not be difficult for smaller cities to copy their larger sisters; they could borrow (verbatim) the ordinances, the rulings in particular cases, even the same court papers.

If Texas can delegate whatever powers of regulation it may exercise to all of its cities, so may the other states. Instead of a maximum of fifty state statutes, a producer would have to comply with many times that number of local ordinances—and the number of suits he might face should he refuse adverse classifications could be tremendous (for any one picture). There are 132 cities with populations over 100,000; 333 with populations over 50,000; and 765 with populations over 25,000 (p. 16, Statistical Abstract of the United States, 1967). If only a portion of these adopted ordinances—to say nothing of smaller cities or counties—the producer's right to defend his freedom of speech would be obliterated.

The very existence of many ordinances creates the threat that several suits would be brought against the producer if he did not accept adverse classifications—the threat that he would have to bear an enormously heavy financial burden of defense if he chose to defend his right of free speech. And, the threat would exist even if the producer were not required to file objection to the ruling.

In *Time, Inc.* v. *Hill,* 385 U.S. 374, this Court emphasized that restraint on freedom of speech can be imposed by "fear of the expense involved" in the defense of suits and that this threat "must inevitably cause publishers to 'steer . . . wider of the unlawful zone.' *New York Times Co.* v.

Sullivan, 376 U. S. at 279." (p. 389) In *Time, Inc.* v. *Hill*, it was a State statute which created, among other deterrents, the threat of expense in defending one's constitutional rights against civil suits. Here, the threat of expense would be created by a myriad of statutes under which many proceedings could be brought against a non-complying producer, his distributors or the local exhibitors of his motion picture. We submit that regulations, which thus inherently create coercion through economic duress, are as unconstitutional as those involved in *Time, Inc.* v. *Hill* and *New York Times Co.* v. *Sullivan*. Moreover, such a system, by the sheer weight of its burden and impossibility of compliance, violates the producer's right to Due Process of Law under the Fourteenth Amendment.

When a producer is compelled to accept an "unsuitable" classification, by default, because the burden of opposition is too great to bear, he has been subjected to a restraint—just as much as if he had been enjoined or penalized by a court. This constitutional defect of the local-option system of regulation cannot be excused on the ground that the producer could have avoided the burden by leaving the defense to each local exhibitor. His right to defend the freedom to exhibit his motion picture is an integral aspect of his right of freedom of speech (*Bantam Books* v. *Sullivan*, *supra*). To deprive him of the right of defense is to deprive him of the right of free speech.

In *Louisiana* v. *N.A.A.C.P.*, 366 U. S. 293, 296, the Court said:

> "We are in an area where, as *Shelton* v. *Tucker*, 364 U. S. 479, emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment. As we there stated: '. . . even

> though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

Assuming the Court were to believe that Texas could regulate the exhibition of motion pictures to children (under a properly drawn statute), we submit that "this governmental purpose . . . cannot be pursued" by allowing cities and other political subdivisions to adopt such regulations—for that is a "means that broadly stifles the fundamental personal liberties when the need can be more narrowly achieved."

Even in the unlikely event that all local review boards accepted a producer's classification of his motion picture, a system of multiple regulation—by the sheer weight of its administrative burden—would inhibit his right of free speech, in violation of the First Amendment. As Mr. Justice Brennan emphasized in *Lamont* v. *Postmaster General*, 381 U.S. 301, "inhibition as well as prohibition" of free speech is banned by the First Amendment. Regulation under a multiple system would be so burdensome as to be totally stultifying. To protect his rights, the producer or his national distributor, would have to file classifications in each jurisdiction, or be certain his exhibitor filed correctly; provide the information required by local ordinances; and be certain that other requirements were also met. Under a multiple system, the burden would not be limited to a maximum of 50 (State) regulations and administrative procedures; it would involve 100 or 300 or more local regulations. And the burden would be magnified enormously if various communities adopted different substantive provisions, different classifications, different age lim-

its, different time limitations, and different procedural rules.

It is true that regulation of motion pictures (to the extent it is constitutionally permissible) at the State level would preclude application of "community standards" on a local basis. But whatever benefits local standards might have, for the producer or the censor, they are heavily outweighed by the dangerous restrictions on free speech inherent in a system of multiple regulation. Moreover, it is very doubtful that local standards vary considerably in the case of motion pictures.

Motion pictures now reach far greater audiences on television than in theatres. On television, a motion picture crosses city and county boundaries; broadcast by one station, it can reach into millions of homes in several States; and a network broadcast can bring it to the vast majority of television sets in the United States. Even if local standards did differ from one city in Texas to another (or from Texas to neighboring States), television completely ignores these differences and will change them, if it has not already done so.

While Dallas teenagers were barred from seeing VIVA MARIA in theatres, television (on September 30, 1967) brought them the movie NEVER ON SUNDAY—"... the sophisticated story of an engaging prostitute ... who insisted on resting on the seventh day ..." (Jack Gould in THE NEW YORK TIMES, Oct. 2, 1967, p. 95). VIVA MARIA was innocuous in its own right; by comparison to NEVER ON SUNDAY it is almost puritanical. Even had the Dallas ordinance applied to television broadcasts of motion pictures, it would not have suppressed NEVER ON SUNDAY, since that reached Dallas through a broadcast by an NBC affiliate in neighbor-

ing Forth Worth. Unless Dallas parents who were not at home that Saturday had locked their television sets in closets, or dismantled them, their children were free to see Miss Mercouri's portrayal of the "engaging prostitute."

POINT II

The ordinance is void for failure to provide notice, or right of defense, to the producer.

The Dallas ordinance violates the producer's rights under the First and Fourteenth Amendments because it does not require notice to him of an adverse classification, or grant him the right to defend proceedings instituted against his motion picture. As we have contended (pages 5-6, supra), the ordinance directly affects the producer's freedom of speech; and his right to defend that freedom is an integral part of it. The ordinance does not provide him the opportunity to exercise this right.

The producer, or the distributor to whom he has assigned national distribution, must be allowed to contest adverse classifications or other restrictions imposed upon local exhibitors of his film. As this Court has pointed out in *Freedman* v. *Maryland,* 380 U.S. 51, the local exhibitor is not likely to defend the right of unrestricted exhibition of a film as vigorously as its producer. (See also *Bantam Books* v. *Sullivan,* 372 U.S. 58, 64 n.). (Indeed, the exhibitor may not even have the same view as to the nature of the picture.)

The local exhibitor cannot be expected to shoulder the financial burden of an administrative proceeding and court action, to defend each motion picture which receives an adverse classification. The cost of defense may not, to him, be worth the difference in box office receipts. He must cal-

culate his costs in terms of several motion pictures he shows during each year and, therefore, the several possible such proceedings. And he must realistically assume that resistance to the local board is likely to produce adverse classifications where they might not otherwise have occurred.

Moreover, the exhibitor, rooted in the community, is far more exposed to social pressures that may lead him to accept adverse classifications of constitutionally protected films and/or refuse to exhibit them. He may not wish to "sustain the accompanying stigma which attaches even though [the picture] may be ultimately found ['suitable' for children]" *Zeitlin* v. *Arnebergh*, 59 C. 2d 901, 906; 383 P. 2d 152, 155. He may not wish to incur the risk of an administrative hearing or an injunction proceeding ". . . since that entails adverse publicity and physical and mental strain as well as expense, even though the prosecution should ultimately terminate" in a finding that the picture was suitable for children. *Bunis* v. *Conway*, 17 A. D. 2d 207; 234 N.Y.S. 2d 435.

The fact that *Interstate Circuit* fought the Dallas ordinance in this test case does not mean that it could afford to continue to do so on a picture-by-picture, or city-by-city basis, should the ordinance be sustained, and spread from community to community. Nor does it follow that the individual owner of a single theatre could afford to shoulder the same burdens as a chain of theatres.

A system of regulation, like the Dallas ordinance, which denies the producer the right of defense, or by its burdens (or other indirect means) compels him to abdicate that function to the local exhibitors of his film, denies his rights of free speech under the First Amendment, and his right to Due Process under the Fourteenth Amendment.

POINT III

The ordinance does not provide the procedural safeguards required by the First and Fourteenth Amendments.

Appellant's brief discusses the ordinance's glaring omission of the procedural safeguards required by the First and Fourteenth Amendments to protect the rights of the producer and the exhibitor. These include: compelling the exhibitor to file a notice of "non-acceptance" to protect his rights; relieving the Board (in the event of non-filing) of the fundamental duty to commence a judicial proceeding, should it determine to impose an adverse classification; and (assuming filing could be justified), allowing an inordinately short time for filing the notice of non-acceptance. And, as Judge Cox pointed out, *Interstate Circuit, Inc.* v. *City of Dallas,* 366 F. 2d 590, 610, the ordinance does not provide or require the prompt hearing and disposition of actions brought by the Board—a fundamental safeguard of First Amendment rights in this area.

Moreover, the ordinance does not provide other required safeguards. By imposing liability for admission of children under a specified age, the statute imposes a formidable deterrent upon the exhibitor; one that cannot be excused by analogy to statutes which restrict conduct unaffected by the First Amendment, such as the sale of liquor to minors (cf. *Smith* v. *California,* 361 U.S. 147, 152-153). To avoid liability for inadvertently admitting a 14 or 15-year old, who has falsely stated he is 16, the exhibitor would have to make considerable efforts to obtain satisfactory evidence of the age of each child admitted—and to preserve the evidence, in case he is prosecuted. In the face of the very con-

siderable burden and risk thus involved in showing a picture classified as "not suitable," the easy alternative for the exhibitor would be not to show the picture. The liquor store whose entire stock is banned to children has no choice; but the exhibitor has a choice between "suitable" and "unsuitable" pictures. It is, indeed, the choice which makes the risk of inadvertently admitting children under 16 too great to take—and which makes the penalty such a serious restraint on pictures intended for an adult audience.

The Dallas ordinance partially recognizes this problem; and seeks to dissuade lying by punishing the child who misstates his age. But this does not provide a sufficient margin of error for the protection of the producer's and exhibitor's rights of free speech. If a child of 9 states he is 16, an exhibitor could not believe him. But a 14-year old child may well look 16 (and may have borrowed evidence to support his lie). An exhibitor should be entitled to rely on a child's statement of his age so long as it is not beyond some prescribed and reasonable boundary of belief—for example, so long as a child's actual age is within three years of the statutory minimum. And the ordinance should explicitly provide this safeguard.

POINT IV

The ordinance restricts the exhibition of motion pictures protected by the First Amendment and is therefore unconstitutional.

In *Interstate Circuit, Inc.* v. *City of Dallas*, 366 F. 2d 590, the Court of Appeals dealt with two central issues. *First*, whether the ordinance could restrict the exhibition of a motion picture to children on grounds other than obscenity;

and, *second*, whether the ordinance could restrict exhibition to children on grounds of obscenity—if the definition of obscenity varied from the one used in appraising films for adult audiences.

Although we believe that the unconstitutionality of the Ordinance is established on other grounds before either of these questions need be reached (POINTS I, II and III, *supra*) and that the Dallas ordinance does not even raise the issue of defining obscenity for children, we respectfully submit our views on these fundamental questions, in the event the Court considers them despite the preliminary, fatal defects of the Ordinance.

(i) The Ordinance Is Unconstitutionally Broad and Indefinite.

The Dallas ordinance poses the two threats to free speech and due proces which were condemned in *Winters* v. *New York*, 333 U.S. 507.

First, it includes "prohibitions against [films], protected by the principles of the First Amendment" (333 U.S. at 509) against any restriction—whether aimed at children or adults. Its broad clauses encompass films that could not be classified as obscene for children. And, even assuming the First Amendment did not protect certain depictions of violence when exhibited to children—the ordinance would restrict films that could not conceivably be squeezed into any definition of "violence" that could be drawn consistent with the First Amendment.

Second, the ordinance "fails to give fair notice of what [films]" will be restricted for exhibition to children (333 U.S. at 509). A producer who wishes to make a film "suitable" for Dallas children could not determine, while pre-

paring it, whether it would satisfy the ordinance. The prohibitions are too vague, ambiguous, and uncertain. In the end, they depend solely on the Board's "judgment" as to whether the film will create "impressions" in children that broad categories of conduct are "profitable, desirable, acceptable, praiseworthy or commonly accepted."

Neither the producer nor an exhibitor could determine, from the ordinance, how to classify a film; or whether an adverse classification by the Board was proper. Nor could the Board find in the ordinance any meaningful guidance for its actions.

(ii) Dallas Cannot Restrict the Exhibition To Children of Films That Are Non-Obscene.

We submit that Judge Thornberry was correct in ruling that a city or state cannot restrict the exhibition of motion pictures to children on grounds other than obscenity; and that other classes of films were protected by the First Amendment, and therefore could not be reached—as could obscenity—by the Dallas ordinance. "Violence," "crime" and "brutality," and semantic variations of these terms, are not among the "well defined and narrowly limited classes of speech" which the Court has held are beyond the protections of the First Amendment (*Chaplinsky* v. *New Hampshire,* 315 U.S. 568). Mr. Justice Reed's opinion in *Winters* v. *New York, supra,* underlines the great risks to free speech and due process inherent in attempting to define such a class of material and deny it the protection of the First Amendment. Those dangers have not abated.

As the Court of Appeals noted: "The long history of the misuse of the censorship power . . . [and] the activities of the censors in the context of total censorship statutes . . ."

make it much too dangerous to withdraw First Amendment protection from classes of speech other than obscenity; and as it also noted, "The child's freedom of speech [is] too precious to be subjected to the whim of the censors (356 F.2d 599).

(iii) The Class of Films That Can Be Restricted For Children, As Obscene, Must Be Clearly Defined.

In *Jacobellis* v. *Ohio,* 378 U.S. 184 (1963), Mr. Justice Brennan suggested that the states consider whether the preferable method of "preventing the dissemination of *material deemed harmful* to children" might be to adopt "laws aimed specifically at preventing the distribution of *objectionable material* to children, rather than at totally prohibiting its dissemination" (p. 195). (Emphasis supplied.)

We respectifully submit that Judge Thornberry was correct in concluding that "harmful" or "objectionable material" was synonymous with "obscene material." However, we disagree with his conclusion that "obscenity" should be measured by variable standards; that it should be determined by "the prurient interest of its intended and probable recipient group." (366 F.2d 590, 596)

A statute, such as the Dallas ordinance, applies to children of all ages—up to 16. Obviously, the "prurient interest" of a child of 10 is not the same as that of a child of 16; it is radically different.

More important, to add to the "obscenity" standard for films, a test of their "appeal" to the "prurient interest" of children, is to add another ambiguous factor which will make the *Roth-to-Memoirs* standard even more difficult to use. Clearly, the standard is not now an easy one to

apply (*Jacobellis* v. *Ohio*, 378 U.S. 184, 187, 191; cf. *People* v. *Fritch*, 13 N. Y. 2d 119, 126). The difficulties are demonstrated by the journey of TROPIC OF CANCER through five state courts of appeal before this Court ruled it was not obscene (*Grove Press* v. *Gerstein*, 378 U.S. 577).

New York and Florida held it obscene; California, Wisconsin and Massachusetts held it was not obscene (*People* v. *Fritch, supra; Grove Press* v. *Gerstein*, 156 So. 2d 537; *Zeitlin* v. *Arnebergh*, 59 C. 2d 903; *Attorney General* v. TROPIC OF CANCER, 345 Mass. 11; *McCauley* v. TROPIC OF CANCER, 20 Wis. 2d 134). The New York judges divided 4 to 3; the Wisconsin judges divided 4 to 3. The two unanimous courts, California and Florida disagreed with each other. By way of contrast—New York which had held TROPIC obscene (4 to 3) ruled that FANNY HILL was not obscene (4 to 3); and Massachusetts, which had held TROPIC was not obscene (4 to 3), held that FANNY HILL was obscene (4 to 3) (*Attorney General* v. *A Book, etc.*, 349 Mass. 69; *Larkin* v. *Putnam's Sons*, 14 N. Y. 2d 399).

It seems obvious that even Justices of the highest state courts have judged a work by their own concept of propriety, rather than the *Roth* standard; and have then couched their findings in the verbiage of the standard. In *People* v. *Fritch*, 13 N.Y. 2d 119, the New York majority recited the elements of the *Roth* standard (p. 123) and said: "If, as the County Court held, (TROPIC OF CANCER) is not obscene as a matter of law, it is difficult to conceive when, if ever, a book can be held obscene under any established legal standard." (p. 124) But Judge Dye, in his dissenting opinion, said that the majority "decision now being rendered is no more than an expression of individual views, having no support aside from its own pronouncement." (p. 129)

If Appellate courts have had difficulty using the *Roth* standard, it is inevitable that local boards of review—passing on the fitness of motion pictures for children—will have greater difficulty. To add the element of variable "prurient interest" will merely give them a broader license, and excuse, for condemning pictures that do not meet their personal concepts of what children should see. It will not provide that precise guidance which is so essential to the protection of free speech (*Winters* v. *New York, supra*).

(iv) The Definition Should Be Based on Mr. Justice Stewart's Description of Hard Core Pornography

If the Court is to depart from the *Roth* standard in dealing with statutes regulating exhibition of "obscene" motion pictures for children, then we respectfully submit that it should consider whether the result might be better achieved by adopting a definition based on the description of "hard-core pornography" made by Mr. Justice Stewart in *Ginzburg* v. *United States,* 383 U. S. 463, 499. In enumerating the kinds of materials he meant by the term, Mr. Justice Stewart included:

> "photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character."

(Cf. *People* v. *Richmond News,* 9 N. Y. 2d 578, 587).

In motion pictures, unlike the published word, action is graphically depicted; and, it may therefore be possible to describe more specifically the types of depicted conduct which constitutes "obscenity", lying beyond the protection of the First Amendment. A definition based on Mr. Justice

Stewart's description of "hardcore pornography" would be less difficult to apply in regulations affecting the exhibition of obscene motion pictures to children. And, it would greatly reduce the opportunity for Board members to substitute their personal concepts of "suitability"—in the guise of interpreting the complex *Roth* standard or one made even more complex by the factor of variable "prurient interest." This would greatly minimize the danger that such regulations produce a 'total suppression of such material" or "reduce the adult population . . . to [viewing] only what is fit for children" (*Jacobellis* v. *Ohio*, 378 U. S. 184, 195).

We doubt that a definition of motion pictures "obscene" for children need move beyond the boundaries of Justice Stewart's definition, but wherever the line be drawn, we respectfully submit that it cannot be carried much beyond the limitations of his classification without affecting films which are by no means obscene for children and which present problems of taste and parental responsibility, rather than "obscenity" or a proven causal relationship to anti-social conduct.

Indeed, the Dallas ordinance implicitly recognizes that the kinds of films which it seeks to restrict do not pose the threat of obscenity, but rather involve questions of parental judgment as to taste. The ordinance provides that it shall not be an offense to admit a child under 16 to a film classified as "not suitable" if he is accompanied by his parent or guardian. Obviously, the state would not allow a parent to take his child to an *obscene* film—it does not allow the parent himself to attend one. Under the Texas obscenity laws a theatre owner prosecuted for exhibiting an obscene motion picture to an adult audience could not

defend on the ground that the adults had attended voluntarily. [Vernon's Ann. P.C. Art. 527].

Dallas thus recognizes that it is essentially the parent's responsibility to decide whether his child should attend motion pictures affected by the Ordinance. But it only allows the parent to make the choice when he accompanies the child. Otherwise, it makes the choice for him; and shifts the burden of enforcing it from the parent to the exhibitor. It does not allow the parent to decide his children may see the film when he does not accompany them. Nor does it recognize a parent's responsibility to prevent his child from attending films he does not want him to see—i. e., to control his child's conduct when the child is away from home. By contrast, Texas not only recognizes, but imposes, this responsibility on a parent when his child "maliciously and willfully damages or destroys property"; in that event, even though the parent is not present, he can be held liable for such damages up to a maximum of $5,000. (Vernon's Ann. Civ. St., Art. 5923-1).

We respectfully submit that a statute which restricts exhibition of motion pictures to children on the ground of obscenity should define obscenity clearly enough so that those who administer it cannot confuse "obscenity" with their personal standards of what is suitable film fare for children. Some parents may decide that a given motion picture, though not obscene, is not suitable for their children. But the decision is one that they should make and enforce on an individual basis. Other parents may reach the opposite conclusion. Others may abdicate their responsibility. But this does not warrant the great risks to freedom of speech which inevitably follow from extending restrictions into the area of the non-obscene. This is particularly

so, since any such restriction of motion pictures will leave untouched many other, and more potent, influences on the development of a child's character and personality: the other media which expose him to the world and sex (television, the daily newspapers, national magazines and records), his day-to-day experiences beyond the walls of his home, and the fundamental influences which develop "anti-social traits . . . at an extremely early age, before the child is capable of intelligent comprehension of films." (EXCLUSION OF CHILDREN FROM VIOLENT MOVIES, 67 Columbia Law Review, 1149, 1155).

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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SUPREME COURT, U. S.

JAN 2 1968

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No. 64

In the

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

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v.

CITY OF DALLAS,

Appellee.

APPELLEE'S BRIEF IN ANSWER TO BRIEF SUBMITTED BY THE AUTHORS LEAGUE OF AMERICA, AMICUS CURIAE

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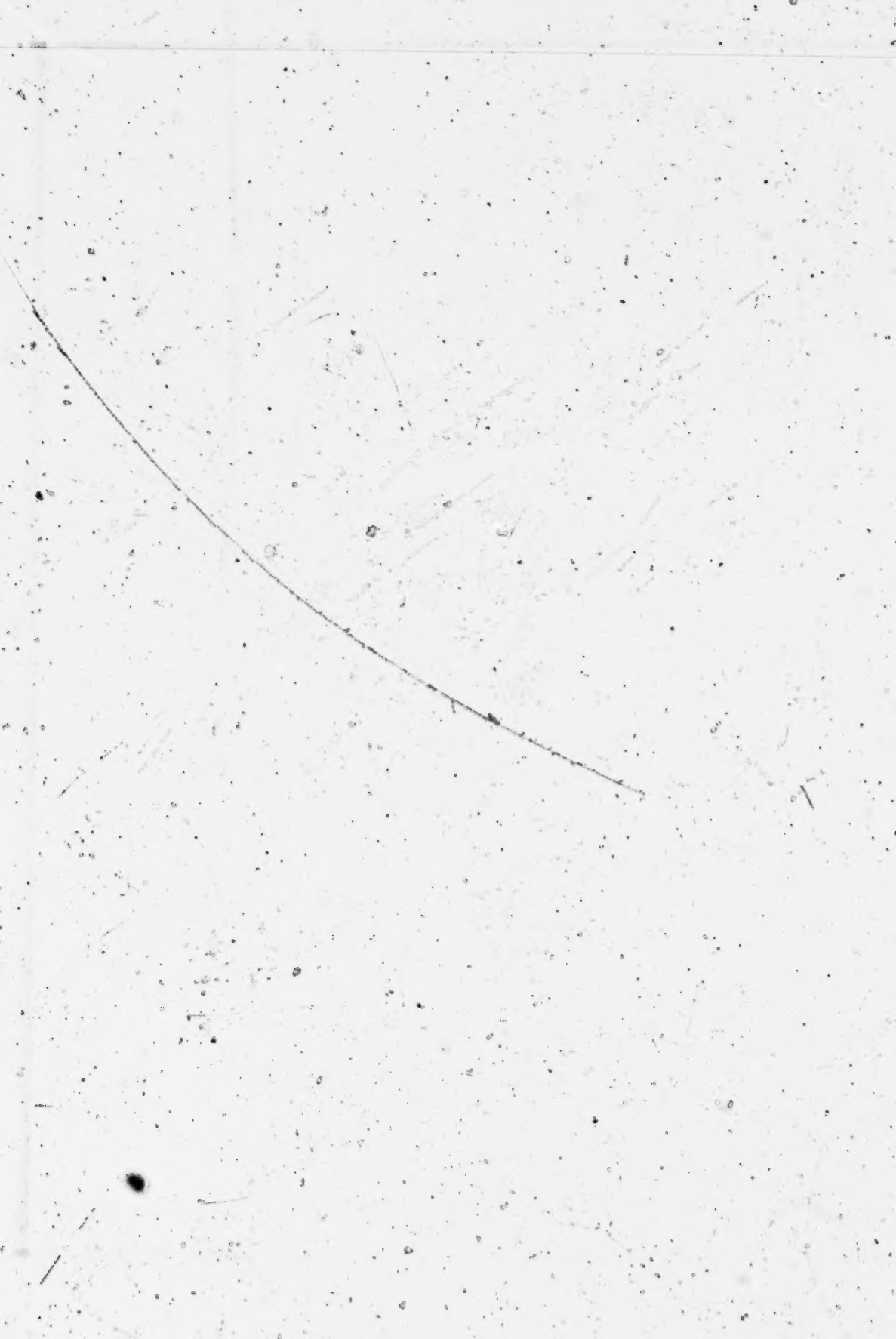

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APPELLEE'S BRIEF IN ANSWER TO BRIEF SUBMITTED BY THE AUTHORS LEAGUE OF AMERICA, AMICUS CURIAE

POINT ONE

A local ordinance regulating the exhibition of a motion picture does not violate its producer's constitutional freedoms of speech and press and the right of due process.

This Honorable Court on several occasions has held that the right of free speech is not absolute at all times under all circumstances. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568; *Near v. State of Minnesota* ex rel. Olson,

283 U.S. 697. It has even pointed the way for the enactment of an Ordinance such as the Dallas Motion Picture Classification Ordinance in the case of *Jacobellis v. Ohio*, 378 U.S. 184.

Yet the Amicus Curiae herein has emphatically contended to this Court that the City of Dallas' Ordinance is per se unconstitutional. It has based its contention on the theory that the onerous burdens of compliance with such an ordinance, its restraint by the Board's classification, and the financial burden of defense to defend the right of free speech will deny the producer of a motion picture his constitutional right to exhibit the same.

Under this approach it would seem that motion pictures must therefore not be questioned as to whether they are obscene, even though this Court has held obscene material not to be protected by the First Amendment. Similarly, there could be no legal remedy for an individual who has been libeled by a motion picture. The so-called "threat" of several lawsuits being brought against the producer if he did not accept an adverse classification of a particular motion picture, obviously could not be any more burdensome or restrictive in nature than the threat of lawsuits being filed against the producer when the question of the motion picture being obscene or libelous is at hand.

The Amicus Curiae, in quoting from the case of *Time, Inc. v. Hill*, 385 U.S. 374 to support its proposition that restraint on freedom of speech can be imposed by the threat of expense of defending one's constitutional rights, failed to point out that this Court did not declare the

particular State Statute involved unconstituional. Moreover, the case did not advocate the elimination of lawsuits when an individual had a cause of action under the Statute. It merely changed the burden of proof, as was done in these kinds of cases in *Freedman v. Maryland*, 380 U.S. 51.

It was stated that the same causal relationship and restrictive effect upon the producer's constitutional rights existed under the Dallas Ordinance as it did in the case of *Bantam Books v. Sullivan*, 372 U.S. 58. However, the Amicus Curiae failed to point out that the restrictive regulations attempted to be applied in that case provided for no safeguards against the suppression of constitutionally protected matter. This is not the case under the provisions of the Dallas Motion Picture Classification Ordinance. Section 46A-3 of Ordinance No. 11284, provides for a speedy review and hearing concerning the classification of a motion picture by the Board. Section 46A-7 of said Ordinance sets up a prompt final judicial determination as to whether such motion picture is "suitable for young persons" or "not suitable for young persons".

The Dallas Motion Picture Classification Ordinance neither restricts the circulation, distribution or exhibition of any motion picture, nor does it infringe upon the rights of children and adults to view any motion picture. The producer is not prohibited from exhibiting any of his pictures within the city limits of the City of Dallas nor is he required to cut or delete any part of his film. No child is denied the right to view a motion picture classified as "not suitable for young persons". Only those under the age

of 16 years are required to be accompanied by a parent, guardian, husband or wife.

The contention that a "not suitable for young persons" label impairs the producer's right to have it exhibited to adult audiences for the reasons of fear of risking community pressures and that adults may accept the label as evidence of immorality which would keep them from seeing the picture, is untenable. The motion picture industry has in the past of its own accord labeled certain movies as for "adults only" or "suggested for mature audiences". Such action does not lend to the proposition that "labels" impair or restrict the rights of the producers.

This Court has had full opportunity to declare that control of movies by local ordinance contravened the Constitution because of the burden of complying with each, but it has not done so. *Times Film Corp. v. Chicago*, 365 U.S. 43. In *Burstyn v. Wilson*, 343 U.S. 495, the Court said that movies came within the provisions of the First Amendment, but stated that there was a "* * * permissible scope of community control, * * *" (P. 502).

POINT TWO

The ordinance does not fail to provide adequate notice and right of defense to the producer.

Amicus Curiae complains that the producer's and exhibitor's rights under the First and Fourteenth Amendments have been violated because the Dallas Ordinance does not give them notice of an adverse classification thereby denying their right of defense in litigation concerning

a particular motion picture. Of course, the distributor, United Artists Corporation, in this case, is a party to this lawsuit and has been since this suit was instituted at the trial court level. It should also be noted that this particular motion picture "Viva Maria" is a foreign produced film and United Artists Corporation had exclusive distribution rights. Thus in light of these facts, how can it be said that this party had no notice of the adverse classification or was denied the right to defend against said classification?

Notice to the exhibitor as provided by the Dallas Ordinance is notice to the producer and distributor. The producer, distributor and exhibitor of a particular motion picture all have common interests in the same by virtue of a contractual arrangement. (Tr. 146) Each is an agent or partner with the other and therefore each would have notice as to an adverse classification of that particular movie.

Again, the Amicus Curiae speaks of the financial burden of administrative proceedings and Court actions produced by the Dallas Ordinance, but now as to the exhibitor. It appears to the Appellee that the contentions expressed are for the right to make profit rather than the right of free speech. Furthermore, if it is true that the exhibitor is exposed to social pressures to the extent that the same may lead him to accept adverse classifications, then why do the producers and distributors by their own actions require an exhibitor to designate certain motion pictures as "for adults only", or "suggested for mature audiences"?

The contentions of the Amicus Curiae if upheld, would mean that the protection of the interests of our children

in this nation should yield to the profit making schemes and plans of private enterprise.

The Amicus Curiae complains that an exhibitor who maintains a local business may not as avidly protect its constitutional rights as it would like him to do. It is to be noted that of the several cases tried in Dallas County, the Authors League of America, Inc., has never yet tried to intervene to protect its rights. It comes at a late date claiming to have been injured. It cites the case of *Zeitlin v. Arnebergh*, 59 C. 2d 901, 383 P. 2d 152. That case pointed out that if one individual was afraid to face public scorn that another would be ready to step in and take his place. The same thing was pointed out in the case of *Roth v. United States*, 354 U.S. 476, in which the Petitioner was convicted or pleaded guilty in six criminal proceedings involving the dissemination of obscene literature. Actually, what Amicus Curiae is complaining of is loss of profits and no more.

POINT THREE

The ordinance provides the procedural safeguards required by the First and Fourteenth Amendments.

The contention that the Dallas Ordinance is void of procedural safeguards required by the First and Fourteenth Amendments, is completely unfounded. The Dallas Ordinance was patterned after the guide line for procedural

safeguards set out in the *Freedman v. Maryland* case, *supra*. It provides:

> (a) That an application for the classification of a motion picture must be approved or disapproved within five days from the date it is submitted to the Board, otherwise the proposed classification is approved;
>
> (b) A notice of non-acceptance by the exhibitor shows his dissatisfaction with the classification and intent not to comply therewith;
>
> (c) If the exhibitor shows a motion picture without classifying it as decided by the Board, a judicial proceeding must still be instigated in a court of proper jurisdiction;
>
> (d) The burden of proof and providing a prompt, speedy judicial review is upon the Board.

At the same time that the Amicus Curiae is complaining of the lack of procedural safeguards, it is complaining of the speed with which the processes are administered.

In fact, on page 14 of its brief, the Amicus Curiae admits that these pictures classified as "not suitable" were "pictures intended for an adult audience."

Similarly, the argument that the Dallas Ordinance poses a "formidable deterrent upon the exhibitor" by imposing liability for admission of children under a specific age is untenable. Section 46A-4 provides that an exhibitor must "knowingly" sell or permit a young person to view the exhibition of any film classified "not suitable for young per-

sons" before any judicial action may be taken. The "considerable burden" as contended, is not placed upon the exhibitor, but rather upon the Motion Picture Classification Board and the City of Dallas. With such provisions, it seems ridiculous to the Appellee herein that the burden of preserving evidence and the risks of inadvertently admitting children under sixteen is too great and therefore a serious restraint on pictures intended for an adult audience. The ordinance requires the exhibitor to be reasonable, and nothing more.

POINT FOUR

The ordinance is not unconstitutional as a restriction upon the exhibition of motion pictures protected by the First Amendment.

The gist of the argument of Amicus Curiae under Point Four is that it wants no standard applied to movies being shown to young people under the age of sixteen, other than the standards of "hard core pornography" which is applied to an adult. It then suggests that the Ordinance must more explicitly define what is obscene than have the Courts. In other words, the argument simply states that it wants to traffic in pornography less than hard-core and line its pockets with the profits therefrom, regardless of the effect it might have on the individual young person. To apply the same standards to the young person as to the adult would leave its hands free, and tie the hands of the local community so that it could not, under any circumstances, protect the public

interest. Certainly this Court is not prepared to extend the doctrine of the First Amendment to such outer extremes.

This Court, and other Courts throughout the land, have had no problem in requiring those in business to distinguish between an adult and a young person in many situations. To be required to do so in this situation is not a new theory. It is not a new burden that business has not borne before and adequately so. Therefore, it creates no standard beyond a reasonable one.

Actually Amicus Curiae throughout its argument is complaining not only of the vagueness of the Dallas Ordinance, but is complaining of the definition of obscenity as used by this Court in its writing. It states that not only can it not understand what is meant by the Dallas Ordinance, but it does not think that the *Roth* definition of obscenity is precise enough to give it a clear guide line. In essence, it desires no guide line, no restrictions and no restraints.

This Court has stated in *United States v. Petrillo*, 322 U.S. 1:

> "* * * but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." (pages 7-8)

We respectfully submit that the Dallas Motion Picture Classification Ordinance is not unconstitutional in that it does not violate the rights and freedoms of the producers or exhibitors of motion pictures. It neither seeks to prohibit nor unconstitutionally restrict the exhibition of a pro-

ducer's work product. It only seeks to protect the immature youth from those protrayals and depictions which would be harmful to a child's well being. It is true that there are other factors that influence a child. Just because other factors injure, is no reason to refuse to control this one. The State provides many safeguards to protect the child. Why not this one?

CONCLUSION

For the reasons and arguments propounded above, we respectfully submit that the Judgment in this case be affirmed.

Respectfully submitted,

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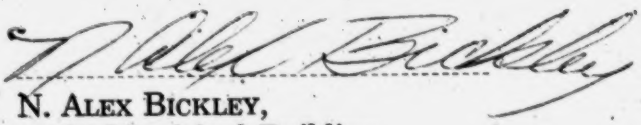
CERTIFICATE OF SERVICE

A copy of this Brief in Response to Brief of Amicus Curiae has been served upon Mr. Dan McElroy and Mr. Paul Carrington, attorneys for Appellant-Intervenor, United Artists Corporation, by delivering same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas, and to Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them at their offices located at 3525 Southland Center, Dallas, Texas; and to Mr. Irwin Karp, 120 Broadway, New York, New York, 10005, Attorney for The Authors League of America, Inc., Amicus Curiae, by depositing same in the United States Mail; and to Mr. Osmond K. Frankel, 120 Broadway, New York, N. Y., 10005; Mr. Edward J. Ennis, 8 West 40th Street, New York, N. Y., 10018; Mr. Melvin L. Wulf and Mr. Alan H. Levine, 156 Fifth Avenue, New York, N. Y., 10010, and Mr. Fred O. Weldon, Jr., 1601 National Bankers Life Building, Dallas, Texas, 75201, Attorneys for Amici Curiae, The American Civil Liberties Union, New York Civil Liberties Union, and Texas Civil Liberties Union, by depositing same in the United States Mail.



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SUPREME COURT, U. S.

IN THE

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October Term, 1967

No. 64

UNITED ARTISTS CORPORATION,
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v.

CITY OF DALLAS,
Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE KAREN HORNEY CLINIC, INC., AS *AMICUS CURIAE* IN SUPPORT THEREOF

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v.

CITY OF DALLAS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Karen Horney Clinic, Inc., respectfully moves for leave to file the annexed brief *amicus curiae* in this proceeding.

The Karen Horney Clinic, established in 1955, is a psychiatric clinic licensed by the Department of Mental Hygiene of the State of New York. It is located at 329 East 62nd Street in the Borough of Manhattan, City of New York. The Clinic, whose program includes psychiatric treatment for both children and adults, is professionally interested in any legislation which purports to deal with and offer possible solutions for the causes of emotional disturbances in and anti-social conduct by children.

The Clinic's medical staff comprises 69 doctors, each of whom has served a residency in a psychiatric hospital approved by the American Medical Association and also has received or is receiving further training at the American Institute of Psychoanalysis. Its clinical staff includes two psychologists and seven psychiatric social workers, among others. In addition, the Clinic is served by consultants in such fields as psychology, sociology and education.

The Clinic's adult program includes treatment for learning and school disabilities, obesity, sexual deviation, and marital problems. Its child program includes a Child

Guidance Clinic, which deals with the prevention, diagnosis and treatment of emotional illness in children; treatment for the emotionally retarded, and therapy for the family as a unit. During the period from July, 1966 to June, 1967 the Clinic conducted 10,985 individual interview sessions, of which 7,477 were adult and 3,508 were with children (age 8-15).

The Clinic also participates in various community action programs, such as a project in cooperation with St. Luke's Hospital to aid elderly isolates and unmarried teenage mothers on the West Side of New York City.

Counsel for the Movant is familiar with the arguments advanced on both sides in this appeal, and believes that there is a need for the additional commentary contained in the attached brief *amicus curiae* on the following two points:

(1) The finding by the City Council of the City of Dallas, as set forth in the Preamble to Dallas City Ordinance No. 11284, that motion pictures are a contributing cause of delinquency, sexually promiscuous conduct and criminal behavior on the part of young persons.

(2) The implied finding by the lower courts in this case that "Viva Maria," and presumably films of similar content, would provoke or create socially deleterious behavior or attitudes on the part of young persons.

Because of its acknowledged experience and eminence in the treatment of emotional disturbances in children, the Karen Horney Clinic believes that its views on these points may aid the Court in its consideration of the issues presented in this appeal. It therefore respectfully requests permission to file the attached brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF THE KAREN HORNEY CLINIC, INC., AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *Amicus* is set forth in the Motion for Leave to File this brief, *supra.*

ARGUMENT

I. No clear causal relationship between motion pictures and anti-social behavior has been established.

The preamble of Dallas ordinance No. 11,284 states that it is necessary for the City of Dallas to establish a system for the classification of motion pictures as to their suitability for young persons because it is the opinion of the City Council that motion pictures are one of the contributing factors of juvenile delinquency and that motion pictures possess a greater capacity for good and evil for young persons than other media of expression.

In other words the premise upon which the City Council of Dallas has acted in adopting the Dallas ordinance is that there is some causal relationship between the viewing of motion pictures and the moral and social behavior of young persons. The City of Dallas contends that it may constitutionally restrain a protected First Amendment freedom because of the harmful effect of that freedom on young persons.

The argument is that cumulative exposure to certain types of films encourages criminal behavior and reinforces factors in the environment which create violent and delinquent behavior. From the point of view of psychotherapy, this argument is specious. There has been little, if any, published clinical evidence to support the position that films lead young persons into delinquent behavior. Indeed, there has been no clear evidence demonstrating a causal relationship between motion pictures and desirable or undesirable moral and social behavior of young persons. In the experience of this clinic, there has never been any instance of deviant behavior resulting from exposure to a motion picture.* No doubt motion pictures may to some extent influence clothing, hair styles, makeup and perhaps even speech patterns. How far and how broad this type of influence may be has not been established. There are contradictory theories with respect to their quantitative impact.** But this is an area completely removed from that of delinquent behavior.

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* To such extent as there have been fears in the young resulting from motion picture content, they have been caused by such children's classics as "Wizard of Oz", "Dumbo", "Bambi", and "Snow White and the Seven Dwarfs". Certainly, this Court would not uphold an ordinance which would deprive the young of exposure to imaginative classics such as these on the premise that these films cause anti-social behavior.

** Hovland, Carl I., Effects of the Mass Media of Communication in The Handbook of Social Psychiatry—Gardner Lindzey, ed., Reading, Mass., Addison-Wesley Publishing Co., 1959—Vol. II.—pp. 1062-1103.

It is not to be disputed that one of the primary concerns of the community must be the prevention of juvenile delinquency and anti-social behavior on the part of young persons. It is for this very reason that the *amicus* urges this Court, in considering the constitutionality of the Dallas ordinance, to weigh the pragmatic effect of a community's reliance on an ordinance of this type as a solution to the problems of anti-social behavior. The question of juvenile delinquency and the factors producing it are complex. Many different facets go into the way society views deviant behavior on the part of young persons. The singling out of one type of influence—and indeed only one of the numerous media to which children are exposed—does not, in our view, contribute to the solution of the problem but instead will hinder research, study and understanding of those factors which may have a more meaningful and direct effect on behavior.

It is for these reasons that we urge the Court, in assessing the constitutional aspects of this ordinance, to consider the fallacy of the premises upon which it has been enacted.

II. The motion picture "Viva Maria" would not provoke or create socially deleterious behavior or attitudes on the part of young persons.

The medical director* of *amicus* Karen Horney Clinic and its Executive Director,** who is also a member of the faculty of the New School for Social Research where he teaches courses relating to motion pictures, both viewed the film "VIVA MARIA" and analyzed its contents to determine its possible effect, if any, on the moral values of young persons. It is their conclusion that "VIVA MARIA," in theory, supports the central and enduring social and ethical values of Western civilization. The film represents tri-

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* Louis R. Hott, MD

** Joseph Goldberg, Ed. D., MSW

umph of freedom over tyranny, of mercy over cruelty and fear, of social justice for the poor and oppressed, and of love over perverse sadism.

"VIVA MARIA" does not appear to portray either "sacrilege" or "sexual promiscuity" The film adopts the pattern of many westerns which clearly differentiate between "good guys" and "bad guys." It differs from the traditional outdoor western only in that its heroes are women rather than men, and that the motion picture has a quasi-religious significance. Throughout the film, however, good is represented as triumphing over the forces of evil.

The testimony adduced at the trial of this case has not demonstrated that "VIVA MARIA" has or might harmfully affect young persons. It is the professional opinion of the amicus that the moral values presented by the film, *i.e.*, the triumph of good over evil, would far outweigh such harmful effect, if any, which the film might have upon young persons and that its suppression for young persons should not have been countenanced by the Texas courts.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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SUPREME COURT, U. S.

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No. 64

In the

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal From the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

REPLY BRIEF FOR APPELLANT UNITED ARTISTS CORPORATION

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No. 64

In the

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal From the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

REPLY BRIEF FOR APPELLANT UNITED ARTISTS CORPORATION

In response to the Brief of Appellee City of Dallas heretofore filed in this appeal proceeding, Appellant United Artists Corporation respectfully submits this Reply Brief, to show the following:

I:

The "Balancing Test" is inapplicable to the questions presented in this appeal.

Appellee City of Dallas urges the Court to employ the "balancing test" in this appeal and uphold the specific pro-

visions of the Dallas classification ordinance, even assuming that it contains constitutional defects.

The City of Dallas has misconstrued the "balancing test." Examination of the decisions of this Court[1] shows that the "balancing test" is inapplicable to the questions presented in this appeal.

(1) The "balancing test" has been employed only in cases involving enactments or regulations "not intended to control the content of speech but *incidentally* limiting its unfettered exercise." *Konigsberg v. State Bar*, 366 U.S. 36, 50 (1961) (emphasis added). In other words, the "balancing test" is applicable, if at all, only where the interference with free speech is *indirect* or *collateral*.

(2) Even though the "balancing test" may justify regulation in a given area which results in *indirect* or *collateral* restraints on free speech, that "test" may be used to justify the particular *means* employed in regulating. As this Court most recently observed in *United States v. Robel*, 36 U.S.L. Week 4060, 4063 (December 11, 1967):

> "* * * [W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. *Shelton v. Tucker*, [364 U.S. 479, 488

[1] In addition to the cases cited in the Brief of Appellee, see, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins*, 36 U.S.L. Week 4006 (U.S. November 6, 1967); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *United States v. Robel*, 36 U.S.L. Week 4060 (U.S. December 11, 1967).

(1960)] * * *. The Constitution and the basic position of First Amendment rights demand nothing less."

In short, the conflict between a particular exercise of legislative power and the First Amendment guarantee of free speech can be resolved only "by legislation drawn more narrowly to avoid the conflict." *United States v. Robel, supra,* at 4063n.20.

By its own terms, the Dallas classification ordinance is intended to impose *direct* controls on the content of speech. In addition, the City of Dallas has not employed the least onerous *means* to accomplish its end; the ordinance's substantive standards are hopelessly indefinite and its procedural provisions fail to guarantee judicial participation or accord due process to the distributor of a motion picture. United Artists therefore believes that the "balancing test" cannot be employed in considering the issues raised by this appeal.

II.

Ordinance No. 11284 does not contain the constitutionally necessary procedural safeguards.

Appellee City of Dallas argues that the ordinance provision requiring a notice of non-acceptance[2] is designed to avoid court proceedings in those instances in which an ex-

[2] Section 46A-7(a); R. 128. In its original Brief (pages 51-58), United Artists argues that Ordinance No. 11284 is separately and independently violative of this Court's decisions in *Freedman v. Maryland,* 380 U.S. 51 (1965), because there is no guarantee of judicial participation before exhibition of a film is restrained as "not suitable for young persons," and *Lamont v. Postmaster General,* 381 U.S. 301 (1965), because the ordinance conditions the City's institution of judicial proceedings upon the filing of a "notice of non-acceptance."

hibitor[3] may not wish to contest the restrictive classification of a motion picture. Such an assertion completely vitiates the effectiveness of this Court's decision in *Freedman v. Maryland*, 380 U.S. 51 (1965), which was designed precisely to correct the situation where the First Amendment rights of the distributor or the public-at-large are surrendered because an exhibitor is unwilling, for reasons of his own, to contest restrictions on the exhibition of a film.[4] Surely, *Freedman* could not possibly be construed to countenance a system which lends public enforcement to private classifications[5] or which delegates to an exhibitor protection of the distributor's right to have its films shown and the public's right to see those films free of impermissible restrictions.

Appellee City of Dallas' reliance on *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), is completely misplaced. As this Court noted in *Freedman v. Maryland*, *supra*, at 53-54, *Times Film* did not validate any of the specific features of the Chicago censorship ordinance but rather merely held

[3] The City of Dallas has made no attempt to answer United Artists' contention that Ordinance No. 11284 is void on its face for failure to accord due process to the distributor of a motion picture. (Brief for Appellant United Artists, pages 58-63.) Under the terms of the ordinance, the distributor is calculatedly excluded from participation in any proceedings thereunder.

[4] John Gilliland, now chairman of the Dallas Motion Picture Classification Board, recently remarked: "The theatre owners have become more cooperative. Many of them are now classifying movies on their own as not suitable for young people. It's making our job a lot easier." (*The Dallas Times Herald*, November 6, 1967, section A, page 19.)

[5] If the Board accepts a "not suitable" classification proposed by an exhibitor, which in all instances heretofore it has done, the ordinance does not permit anyone to file a notice of non-acceptance. Section 46A-7(a); R. 128.

that administrative prior restraint of motion pictures is not unconstitutional *per se*.[6]

III.

The standards for classification under Ordinance No. 11284 are not sufficiently narrow and definite.

Appellee City of Dallas has not responded to United Artists' contention that the standards contained in Ordinance No. 11284 are vague, indefinite and overbroad under prior decisions of this Court, nor has it even attempted to distinguish such standards from those held invalid by this Court in the cases reviewed at pages 33 through 39 of United Artists' original Brief. Instead, the City has confined its argument to the general proposition that "a different standard can be applied to the young person than that applied to the adult."

The City of Dallas relies in part on this Court's decisions in *Ginzburg v. United States*, 383 U.S. 463 (1966), and *Mishkin v. New York*, 383 U.S. 502 (1966). *Ginzburg* does not endorse a concept of "variable obscenity" based on a

[6] The validity of the specific features of an amended version of the Chicago ordinance is now being challenged in an appeal which has been docketed in this Court. *Teitel Film Corp. v. Cusack* (No. 787).

United Artists believes that if the Court reconsidered its holding in *Times Film*, it would hold that, even assuming motion pictures may be "different" from books, the abuses which inevitably accompany an *administrative* system of review are the same in the case of each. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Holding v. Blankenship*, 387 U.S. 94 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967). Indeed, the record in this case seriously undermines the Court's apparent assumption in *Freedman* that the imposition of certain procedural safeguards would prove sufficient to prevent those abuses. Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

material's appeal to different audiences. *Mishkin* may indicate this Court's approval of such a concept, but carefully limits its application to cases in which there has first been proof that the material in question "is designed for and primarily disseminated to" the group upon the basis of whose prurient interests the appeal of the material is to be judged. *Mishkin v. New York, supra,* at 508. There is no evidence in the record of this case to show that "VIVA MARIA" was designed for and primarily disseminated to "young persons," rather than the public-at-large; nor does the Dallas ordinance condition its application upon such preliminary proof. Appellee's reliance upon the *Ginzburg* and *Mishkin* cases is therefore misplaced. Indeed, the City has contended throughout this litigation, and one justice of the Court of Civil Appeals expressly held, that the ordinance is not aimed at obscenity, constant or variable.

Appellee also relies on this Court's decision in *Prince v. Massachusetts,* 321 U.S. 158 (1944), a case which arose under the "free exercise" clause of the First Amendment and involved a regulation of *conduct,* not speech.[7] This Court has long recognized that the state's permissible range of regulation over conduct, even though speech may be affected indirectly, is much broader than its constitutionally permissible range of regulation over speech as such. See,

[7] Appellant in *Prince* expressly disclaimed any reliance upon the First Amendment right of free speech. 321 U.S. at 164. In his opinion for a majority of the Court, Mr. Justice Rutledge held that "the power of the state to control the *conduct* of children reaches beyond the scope of its authority over adults * * *." *Id.* at 170 (emphasis added). In his dissenting opinion, Mr. Justice Murphy noted that "[n]o question of freedom of speech or freedom of press is present and we are not called upon to determine the permissible restraints on those rights." *Id.* at 172.

e.g., *Cox v. Louisiana*, 379 U.S. 536, 554-555 (1965). The Dallas ordinance, by contrast, involves a direct regulation of speech.

On page 18 of its Brief, the City notes that states have been permitted to pass laws imposing various disabilities upon children. But, as this Court has repeatedly said, states are not permitted such regulatory latitude where the constitutional right of free speech is involved. See, e.g., *Smith v. California*, 361 U.S. 147, 150-152 (1959).

Nor is any support for the City's position found in *Chemline, Inc. v. City of Grand Prairie*, 364 F. 2d 721 (5th Cir. 1966). Cases involving restrictions on the *places* where certain films may be shown, even though motivated in part by the *ages* of possible viewers, are clearly inapposite to the issues raised by this appeal. The ordinances involved in *Chemline*, for example, merely served to prevent involuntary but unavoidable exposure to films which might prove offensive.[8] See *Redrup v. New York*, 386 U.S. 767, 769 (1967) (exhibition "in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it"); *Fort v. City of Miami*, 36 U.S.L. Week 3173 (October 23, 1967).

[8] Although the majority in *Chemline* purported to sustain the ordinances on the ground that they constituted a reasonable method by which children could be prevented from viewing the films in question, such a rationale might violate this Court's holding in *Butler v. Michigan*, 352 U.S. 380, 383 (1957), in that it "reduce[s] the adult population of [Grand Prairie] to [viewing on screens of the described type] only what is fit for children."

See also the concurring opinion of Judge Moore, in which highway safety considerations are stressed. *Chemline, Inc. v. City of Grand Prairie*, 364 F. 2d 721, 734 (5th Cir. 1966).

In addition, even assuming that standards governing the dissemination of material to minors may differ from those governing the dissemination of material to adults, such standards must still be narrow and definite. As noted above, the City has not answered United Artists' contention that the standards set forth in the Dallas ordinance are too vague, indefinite and overbroad to satisfy the constitutional requirements enunciated in previous decisions of this Court.[9]

IV.

The Dallas Classification Ordinance as applied imposed an unconstitutional restraint on exhibition of the motion picture "Viva Maria."

Classification of "VIVA MARIA" as "not suitable for young persons" is not at any point in the City's brief defended on the ground that the film is obscene or obscene when viewed by an audience of young persons. In addition, as the record in this case shows, "VIVA MARIA"[10] was classified for reasons either unarticulated or, if articulated, contradictory—different reasons have been cited by two members of the Board, by the City, by the trial judge, and by the two justices of the Court of Civil Appeals. (Brief for Appellant United Artists, pages 40-48.)

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[9] Although the Dallas Motion Picture Classification Board has 46 separate and distinct standards upon which to base a classification, there is some doubt as to whether the Board adheres even to those standards in making its decisions. Some members of the Board have stated that the only "standard" they use in determining whether a motion picture is "not suitable for young persons" is: "[W]ould I want my youngster to see this movie?" (*The Dallas Times Herald*, November 6, 1967, section A, page 19.)

[10] Because of a typographical error, the American premiere date for "VIVA MARIA" was listed in the Brief for Appellant United Artists (page 9) as December 18, 1963. This should be corrected to December 18, 1965.

The City argues that the fact the ordinance might have been applied improperly in this case has no bearing on the constitutionality of the ordinance as such. However, as this Court has repeatedly noted, that is not so where the "effect is to leave standing a statute [or ordinance] patently capable of many unconstitutional applications * * *." *Smith v. California*, 361 U.S. 147, 151 (1959). And, as the record in the instant appeal shows, Ordinance No. 11284, because of its procedural infirmities and vague standards, is capable of almost nothing else.

V.

There is no evidence establishing a causal connection between motion pictures and juvenile delinquency, as alleged by Appellee in its answers to the *amicus curiae* Briefs.

In an apparent attempt to augment its original Brief, Appellee has filed unprecedented answers to the *amicus curiae* Briefs filed by The Authors League of America, Inc., and the American Civil Liberties Union and its New York and Texas affiliates. United Artists wishes to comment on only one point in particular.

Appellee asserts that the City Council of the City of Dallas, "after much investigation and deliberation," has found that many motion pictures have a "detrimental effect" upon the behavior of young persons. However, no such supposed findings are anywhere set forth. In addition, the City's assertion that "most authorities" agree with the con-

clusion of its City Council is an unwarranted statement unsupported by any reference or citation.

Indeed, the most reputable evidence is either to the contrary or that no conclusive finding can be made. (See *amicus curiae* Brief of American Civil Liberties Union, pages 7-9.) Recognizing this fact, Congress has recently provided for the creation of a Commission on Obscenity and Pornography "to determine whether such materials are harmful to the public, *and particularly to minors* * * *" (Public Law 90-100; 90th Congress, S. 188.) In addition, United Artists understands that a motion has been made on behalf of Karen Horney Clinic, Inc., a nationally renowned psychiatric clinic whose program includes treatment of juveniles, to file an *amicus curiae* brief which challenges the validity of the premises upon which the Dallas classification ordinance is based and indeed suggests the mischief of such an approach to such a complex problem as juvenile delinquency.

Under such circumstances, United Artists believes that neither the City nor this Court can proceed upon an assumption that a "nexus" between motion pictures and juvenile delinquency exists. See *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539, 1963; *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 1966.

In short, while the purpose underlying the ordinance may be noble, the City cannot achieve that purpose by suppression of free speech, either totally or partially. The purpose of this specific ordinance is unsupportable scientifically or otherwise, and cannot be rationalized on the basis of the

legislative right to be wrong. For, as this Court has repeatedly made clear, when freedom of expression is involved, even legislative prerogatives must yield.

CONCLUSION

On each and every of the foregoing grounds and on each and every of the grounds set forth in Appellant's original Brief on file herein, Appellant United Artists Corporation prays that the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Paul Carrington, one of the attorneys for United Artists Corporation, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of January, 1968, I served copies of the foregoing Reply Brief for the Appellant United

Artists Corporation on the following parties by depositing the same in the United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee City of Dallas and Appellant Interstate Circuit, Inc. at the following post office addresses, respectively:

1. To Appellee City of Dallas:

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   Mr. Ted P. MacMaster
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   Mr. Grover Hartt
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SUPREME COURT OF THE UNITED STATES

Nos. 56 AND 64.—OCTOBER TERM, 1967.

	Interstate Circuit, Inc., Appellant,	
56	*v.*	On Appeals From the Court of Civil Appeals of Texas, Fifth Supreme Judicial District.
	City of Dallas.	
	United Artists Corporation, Appellant,	
64	*v.*	
	City of Dallas.	

[April 22, 1968.]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellants are an exhibitor and the distributor of a motion picture named "Viva Maria," which, pursuant to a city ordinance, the Motion Picture Classification Board of the respondent City of Dallas classified as "not suitable for young persons." A county court upheld the Board's determination and enjoined exhibition of the film without acceptance by appellants of the requirements imposed by the restricted classification. The Texas Court of Civil Appeals affirmed,[1] and we noted probable jurisdiction, 387 U. S. 903, to consider the First and Fourteenth Amendment issues raised by appellants with respect to respondent's classification ordinance.

That ordinance, adopted in 1965, may be summarized as follows.[2] It establishes a Motion Picture Classifica-

[1] 402 S. W. 2d 770 (1966). The Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the Court of Civil Appeals. 28 U. S. C. § 1257 (2).

[2] The ordinance is set forth in an Appendix to this opinion. The parties disagree as to the meaning of certain of its provisions that have not been authoritatively interpreted by courts of the State. The differences are not material to our decision, however, and the

tion Board, composed of nine appointed members, all of whom serve without pay. The Board classifies films as "suitable for young persons" or as "not suitable for young persons," and defines young persons as children who have not reached their 16th birthday. An exhibitor must be specially licensed to show "not suitable" films.

The ordinance requires the exhibitor, before any initial showing of a film, to file with the Board a proposed classification of the film together with a summary of its plot and similar information. The proposed classification is approved if the Board affirmatively agrees with it, or takes no action upon it within five days of its filing.

If a majority of the Board is dissatisfied with the proposed classification, the exhibitor is required to project the film before at least five members of the Board at the earliest practicable time. At the showing, the exhibitor may also present testimony or other support for his proposed classification. Within two days the Board must issue its classification order. Should the exhibitor disagree, he must file within two days [3] a notice of nonacceptance. The Board is then required to go to court within three days to seek a temporary injunction, and a hearing is required to be set on that application within five days thereafter; if the exhibitor agrees to waive notice and requests a hearing on the merits of a permanent injunction, the Board is required to waive its application for a temporary injunction and join in the exhibitor's request. If an injunction does not issue within 10 days of the exhibitor's notice of nonacceptance, the

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summary of the ordinance in the text above should not be taken as acceptance by us of any of the parties' conflicting interpretations, nor as expressing any view on the validity of provisions of the ordinance not challenged here.

[3] The two-day period is apparently part of an attempt to assure prompt final determination. The ordinance also provides that "any initial or subsequent exhibitor" may seek reclassification of a film previously classified.

Board's classification order is suspended.[4] The ordinance does not define the scope of judicial review of the Board's determination, but the Court of Civil Appeals held that *de novo* review in the trial court was required.[5] If an injunction issues and the exhibitor seeks appellate review, or if an injunction is refused and the Board appeals, the Board must waive all statutory notices and times, and join a request of the exhibitor, to advance the case on the appellate court's docket, *i. e.*, do everything it can to assure a speedy determination.

The ordinance is enforced primarily by a misdemeanor penalty: an exhibitor is subject to a fine of up to $200 if he exhibits a film that is classified "not suitable for young persons" without advertisements clearly stating its classification or without the classification being clearly posted, exhibits on the same program a suitable and a not suitable film, knowingly admits a youth under age 16 to view the film without his guardian or spouse accompanying him,[6] makes any false or willfully misleading statement in submitting a film for classification, or exhibits a not suitable film without having a valid license therefor.

The same penalty is applicable to a youth who obtains admission to a not suitable film by falsely giving his age as over 16 years, and to any person who sells or gives

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[4] Appellants assert that, despite the seemingly clear words of the suspension provision, exhibitors in practice have not been free to show films without a not suitable notification while a court challenge is pending, even though an injunction has not issued within the 10-day period. See n. 2, *supra*.

[5] 402 S. W. 2d 770, 774–775.

[6] Respondent says that youths under 16 years of age accompanied throughout the showing of the picture by a guardian (parent) or spouse, may attend not suitable films. Appellants read the ordinance as making the existence of such accompaniment solely a matter of defense should a criminal prosecution ensue. See n. 2, *supra*.

to a youth under 16 a ticket to a not suitable film, or makes any false statements to enable such a youth to gain admission.[7]

Other means of enforcement, as against the exhibitor, are provided. Repeated violations of the ordinance, or persistent failure "to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen," may be the basis for revocation of a license to show not suitable films.[8] Such a persistent failure, or exhibition of a not suitable film by an exhibitor with three convictions under the ordinance, *inter alia*, are defined as "public nuisances," which the Board may seek to restrain by a suit for injunctive relief.

The substantive standards governing classification are as follows:

> " 'Not suitable for young persons' " means:
> "(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or
> "(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the

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[7] See n. 6, *supra*. It appears that a parent who purchases a ticket to a not suitable film and gives it to his child is subject to the misdemeanor penalty of the ordinance. To be sure, respondent indicated at oral argument that criminal sanctions have not been sought against anyone under the ordinance.

[8] In related litigation, the provision for revocation of the special license was held unconstitutional as violative of *Butler* v. *Michigan*, 352 U. S. 380 (1957), by District Judge Hughes, 249 F. Supp. 19, 25 (D. C. N. D. Tex., 1965), and that ruling was not challenged on appeal. See *Interstate Circuit, Inc.* v. *City of Dallas*, 366 F. 2d 590, 593, n. 5 (C. A. 5th Cir., 1966).

judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

"A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons,' the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

Appellants attack those standards as unconstitutionally vague. We agree. Motion pictures are, of course, protected by the First Amendment, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952), and thus we start with the premise that "[p]recision of regulation must be the touchstone," *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). And while it is true that this Court refused to strike down, against a broad and generalized attack, a prior restraint requirement that motion pictures be submitted to censors in advance of exhibition, *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43 (1961), there has been no retreat in this area from rigorous insistence upon procedural safeguards and judicial superintendence of the censor's action. See *Freedman* v. *Maryland*, 380 U. S. 51 (1965).[9]

[9] See also *Teitel Film Corp. v. Cusack*, 390 U. S. 139 (1968).

In *Winters* v. *New York*, 333 U. S. 507 (1948), this Court struck down as vague and indefinite a statutory standard interpreted by the state court to be "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes . . . ." *Id.*, at 518. In *Joseph Burstyn, Inc.* v. *Wilson, supra*, the Court dealt with a film licensing standard of "sacrilegious," which was found to have such an all-inclusive definition as to result in "substantially unbridled censorship." 343 U. S., at 502. Following *Burstyn*, the Court held the following film licensing standards to be unconstitutionally vague: "of such character as to be prejudicial to the best interests of the people of said city," *Gelling* v. *Texas*, 343 U. S. 960 (1952); "moral, educational or amusing and harmless," *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587 (1954); "immoral," and "tend to corrupt morals," *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587 (1954); "approve such films . . . which are moral and proper; . . . disapprove such as are cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals," *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870 (1955).[10] See also *Kingsley Int'l Pictures Corp.* v.

[10] There are numerous state cases to the same effect. See, *e. g.*, *Police Commissioner* v. *Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727, cert. denied, 364 U. S. 909 (1960) ("violent bloodshed, lust or immorality or which, for a child below the age of eighteen are obscene, lewd, lascivious, filthy, indecent or disgusting and so presented as reasonably to tend to incite such a child to violence or depraved or immoral acts"); *People* v. *Kahan*, 15 N. Y. 2d 311, 206 N. E. 2d 333 (1965); *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409, 201 N. E. 2d 14 (1964) ("descriptions of illicit sex or sexual immorality"); *Hallmark Productions, Inc.* v. *Carroll*, 384 Pa. 348, 121 A. 2d 584 (1956) ("sacrilegious, obscene, indecent, or immoral, or such as tend . . . to debase as corrupt morals"). In *Paramount Film Distributing Corp.* v. *City of Chicago*, 172 F. Supp. 69 (D. C. N. D. Ill., 1959), it was alternatively held that the standard "tends

Regents, 360 U. S. 684, 699–702 (Clark, J., concurring in result).

The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. Indeed, we are told that this ordinance is being used as a model for legislation in other localities. Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than running that risk, he might choose nothing but the innocuous, perhaps save for the so-called "adult" picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults—perhaps a "Viva Maria"—may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

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toward creating a harmful impression on the minds of children" was indefinite; that provision had no further legislative or judicial definition and is therefore unlike the statute in *Ginsberg* v. *New York, ante,* 390 U. S., at ——, where the phrase "harmful to minors" is specifically and narrowly defined in accordance with tests this Court has set forth for judging obscenity.

Of course, as the Court said in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S., at 502, "[i]t does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." What does follow at the least, as the cases above illustrate, is that the restrictions imposed cannot be so vague as to set "the censor . . . adrift upon a boundless sea . . . ," *id.*, at 504. In short, as Justice Frankfurter said, "legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion . . . ," *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U. S., at 694 (concurring opinion), one reason being that "where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative [by vagueness]," *Joseph Burstyn, Inc.* v. *Wilson, supra*, at 532 (concurring opinion). Thus, to the extent that vague standards do not sufficiently guide the censor, the problem is not cured merely by affording *de novo* judicial review. Vague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial; "individual impressions became the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law," *Kingsley Int'l Pictures Corp.* v. *Regents, supra*, at 701 (Clark, J., concurring in result).[11]

The dangers inherent in vagueness are strikingly illustrated in this case. Five members of the Board viewed "Viva Maria." Eight members voted to classify it as "not suitable for young persons," the ninth member not voting. The Board gave no reasons for its determina-

[11] See also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 90 (1960); Klein, Film Censorship: The American and British Experience, 12 Vill. L. Rev. 419, 428 (1967).

tion.[12] The Board alleged in its petition for an injunction that the classification was warranted because the film portrayed "sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." Two Board members, a clergyman and a lawyer, testified at the hearing. Each adverted to several scenes in the film which, in their opinion, portrayed male-female relationships in a way contrary to "acceptable and approved behavior." Each acknowledged, in reference to scenes in which clergymen were involved in violence, most of which was farcical, that "sacrilege" might have entered into the Board's determination. And both conceded that the asserted portrayal of "sexual promiscuity" was implicit rather than explicit, *i. e.*, that it was a product of inference by, and imagination of, the viewer.

So far as "judicial superintendence"[13] and *de novo* review is concerned, the trial judge, after viewing the film and hearing argument, stated merely: "Oh, I realize you gentlemen may be right. There are two or three

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[12] The ordinance does not require the Board to give reasons for its action. Compare *ACLU* v. *City of Chicago*, 13 Ill. App. 2d 278, 286, 141 N. E. 2d 56, 60 (1957):

"[T]he censoring authority, in refusing to issue a permit for showing the film, should be obliged to specify reasons for so doing . . . . The trial court, as well as the reviewing court, would then have a record, in addition to the film itself, on which to decide whether the ban should be approved. . . . Without such procedure, the courts become, not only the final tribunal to pass upon films, but the only tribunal to assume the responsibility of the censoring authority."

Accord, *Zenith Int'l Film Corp.* v. *City of Chicago*, 291 F. 2d 785 (C. A. 7th Cir., 1961). See also Note, 71 Harv. L. Rev. 326, 338 (1957).

[13] *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963). See *Freedman* v. *Maryland*, *supra*.

features in the picture that look to me would be unsuitable to young people. . . . So I enjoin the exhibitor . . . from exhibiting it."[14] Nor did the Court of Civil Appeals provide much enlightenment or a narrowing definition of the ordinance. United Artists argued that the obscenity standards similar to those set forth in *Roth* v. *United States*, 354 U. S. 476 (1957), and other decisions of this Court ought to be controlling.[15] The majority of the Court of Civil Appeals held, alternatively, (1) that such cases were not applicable because the legislation involved in them resulted in suppression of the offending expression rather than its classification; (2) that if obscenity standards were applicable then "Viva Maria" was obscene as to adults (a patently untenable conclusion) and therefore entitled to no constitutional protection; and (3) that if obscenity standards be modified as to children, the film was obscene as to them, a conclusion which was not in terms given as a narrowing interpretation of any specific provision of the ordinance. 402 S. W. 2d 770, 775–776. In regard to the last alternative holding, we must conclude that the court in effect ruled that the "portrayal . . . of sexual promiscuity as acceptable," *id.*, at 775, is in itself obscene as to children.[16] The court

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[14] In response to a request that he make findings, the trial judge stated: "I decline. I have so many irons for a little fellow. I have taken on more than I can do, trying to decide a big case here, and I have got others at home and here and in Hill county where I have been helping out, and I do not have time to do it. I decline."

[15] Appellants also contend here that, in addition to its vagueness, the ordinance is invalid because it authorizes the restraint of films on constitutionally impermissible grounds, arguing that the limits on regulation of expression are those of obscenity, or at least obscenity as judged for children. In light of our disposition on vagueness grounds, we do not reach that issue.

[16] A concurring justice of that court, with whom the author of the majority opinion agreed, specifically rejected the view that obscenity standards were relevant at all in determining the limits of the ordi-

also held that the standards of the ordinance were "sufficiently definite." *Ibid.*

Thus, we are left merely with the film and directed to the words of the ordinance. The term "sexual promiscuity" is not there defined [17] and was not interpreted in the state courts. It could extend, depending upon one's moral judgment, from the obvious to any sexual contacts outside a marital relationship. The determinative manner of the "describing or portraying" of the subjects covered by the ordinance (see pp. 4–5, *supra*), including "sexual promiscuity," is defined as "such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons." A film is so " 'likely to incite or encourage' crime delinquency or sexual promiscuity if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted." It might be excessive literalism to insist, as do appellants, that because those last six adjectives are stated in the disjunctive, they represent separate and alternative subtle determinations the Board is to make, any of which results in a not suitable classification. Nonetheless, "[w]hat may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included in the term 'desir-

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nance. But nothing in that opinion clarifies the standards adopted. 402 S. W. 2d, at 777–779.

[17] Respondent adopted an amendment to the ordinance in March 1966, which is not involved here. It defines "sexual promiscuity" as "indiscriminate sexual intimacies beyond the customary limits of candor in the community, and said term as defined herein shall include, but not be limited to sexual intercourse as that term is defined."

able, acceptable, or proper.' This is nothing less than a roving commission . . . ." *Kingsley Int'l Pictures* v. *Regents*, 360 U. S., at 701 (Clark, J., concurring in result).[18]

Vagueness and the attendant evils we have earlier described, see pp. 7–8, *supra*, are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression. Cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963).[19] Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. As Chief Judge Fuld has said:

> "It is . . . essenti[al] that legislation aimed at protecting children from allegedly harmful expression—no less than legislation with respect to adults—be clearly drawn and that the standards

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[18] An alternative to "likely to incite" because the portrayal might "create the impression . . . [the] conduct is profitable, desirable," etc., is set forth in the ordinance. That is if the manner of presentation is "likely . . . to appeal to their [young persons'] prurient interest." That alternative, however, was not relied upon by the Board members who testified, nor by the appellate court.

[19] In *Bantam Books*, the Commission there charged with reviewing material "manifestly tending to the corruption of the youth" (372 U. S., at 59) had no direct regulatory or suppressing functions, although its informal sanctions were found to achieve the same result. The Court held that "system of informal censorship" (*id.*, at 71) to violate the Fourteenth Amendment. One important factor in that decision was the Commission's "vague and uninformative" mandate, which the Commission in practice had "done nothing to make . . . more precise." *Ibid.* See also I. Carmen, Movies, Censorship, and the Law, *passim* (1966); Klein, Film Censorship: The American and British Experience, 12 Vill. L. Rev. 419, 455 (1967); Note, 71 Harv. L. Rev. 326, 342 (1957).

> adopted be reasonably precise so that those who are governed by the law and those who administer it will understand its meaning and application." *People* v. *Kahan,* 15 N. Y. 2d 311, 313, 206 N. E. 2d 333, 335 (1965) (concurring opinion).[20]

The vices—the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of the effectiveness of judicial review—are the same.

It is not our province to draft legislation. Suffice it to say that we have recognized that some believe "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression," *Joseph Burstyn, Inc.* v. *Wilson, supra,* at 502, and we have indicated more generally that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. *Ginsberg* v. *New York, ante.*[21] Here we conclude only that "the absence of narrowly drawn, reasonable and definite standards for the officials to follow," *Niemotko* v. *Maryland,* 340 U. S. 268, 271 (1951), is fatal.[22]

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[20] See also, *e. g., Katzev* v. *County of Los Angeles,* 52 Cal. 2d 360, 341 P. 2d 310 (1959) (magazine sales to minors under age 18); *People* v. *Bookcase, Inc., supra,* n. 10 (book sales to minors under age 18); *Police Commissioner* v. *Siegel Enterprises, Inc., supra,* n. 10 (sale of certain publications to those under 18); *Paramount Film Distributing Corp.* v. *City of Chicago, supra,* n. 10 (special license for films deemed objectionable for those under age 21).

[21] On age classification with regard to viewing motion pictures, see generally, I. Carmen, Movies, Censorship, and the Law 247–260 (1966); Note, 69 Yale L. J. 141 (1959).

[22] Appellants also assert that the city ordinance violates the teachings of *Freedman* v. *Maryland, supra,* because it does not secure prompt state appellate review. The assurance of a "prompt final judicial decision" (380 U. S., at 59) is made here, we think, by the

The judgment of the Texas Court of Civil Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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guaranty of a speedy determination in the trial court (in this case nine days after the Board's classification). See *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139 (1968). Nor is *Freedman* violated by the requirement that the exhibitor file a notice of nonacceptance of the Board's classification. To be sure, it is emphasized in *Freedman* that "only a procedure requiring a judicial determination suffices to impose a valid final restraint" (*id.*, at 58), and here if the exhibitor chooses not to file the notice of nonacceptance, the Board's determination is final without judicial approval. But we are not constrained to view that procedure as invalid in the absence of a showing that it has any significantly greater effect than would the exhibitor's decision not to contest in court the Board's suit for a temporary injunction. The ordinance provides that the Board has the burden of going to court to seek a temporary injunction, once the exhibitor has indicated his nonacceptance, and there it has the burden of sustaining its classification.

Finally, appellant United Artists contends the ordinance unconstitutionally infringes upon its rights by not providing for participation by a distributor, who might wish to contest where an exhibitor would not. Of course the distributor must be permitted to challenge the classification, cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 64, n. 6 (1963), but the respondent assures us he may (see n. 2, *supra*), and United Artists was permitted to intervene in the trial court.

APPENDIX.

Chapter 46A of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, as amended, provides:

Section 46A–1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A–2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered "likely to incite or encourage" crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the im-

pression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to "prurient interest" of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is "not suitable for young persons," the Board shall consider the films as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) "Classify" means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) "Advertisement" means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) "Initial exhibition" means the first exhibition of any film within the City of Dallas.

(j) "Subsequent exhibition" means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) "File" means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) "Classification order" means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term "Board" as used and applied in subsection (a) of Section 46A–7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A–2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A–3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it "approved" and file it as its own classification order. If the Board fails to act, that

is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification "not suitable for young persons," the exhibitors showing the film

shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A–4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified "not suitable for young persons" if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified "not suitable for young persons" without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified "not suitable for young persons."

(5) Knowingly to permit any young person to view the exhibition of any film classified "not suitable for young persons."

(6) To exhibit any film classified "not suitable for young persons" or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified "suitable for young persons"; provided that any advertising preview or trailer containing a scene or

scenes from an unclassified film or a film classified "not suitable for young persons" may be shown at any time if same has been separately classified as "suitable for young persons" under the provisions of Section 46A–3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified "not suitable for young persons" without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified "not suitable for young persons."

(2) To enter or remain in the viewing room of any theatre where a film classified "not suitable for young persons" is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified as "not suitable for young persons."

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified "not suitable for young persons."

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified as "not suitable for young persons."

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, pur-

chasing of a ticket, or viewing by a young person of a film classified "not suitable for young persons," it shall be a valid defense that such young person was accompanied by his legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A–5. *License:*

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified "not suitable for young persons."

Section 46A–6. *Revocation or suspension of license:*

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified "not suitable for young persons" are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file an order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1)

year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A–7. *Judicial Review*:

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the

duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same

as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said motion within two (2) days after the signing of the judgment (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its

motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A–7, shall constitute acceptance of such classifiscation order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subsection (c) of Section 46A–3 above.

Section 46A–8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A–4 of this ordinance.

(b) Any exhibition of a film classified as "not suitable for young persons" at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as "not suitable for young persons" by an exhibitor who fails to use reasonable diligence to determine whether persons ad-

mitted to such exhibitions are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as "not suitable for young persons" by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A–4 of this ordinance in connection with the exhibition of the same film.

Section 46A–9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A–8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A–10. *Exemption to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A–11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose.

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

SUPREME COURT OF THE UNITED STATES

Nos. 56 AND 64.—OCTOBER TERM, 1967.

Interstate Circuit, Inc., Appellant; 56 *v.* City of Dallas. United Artists Corporation, Appellant, 64 *v.* City of Dallas.	On Appeals From the Court of Civil Appeals of Texas, Fifth Supreme Judicial District.

[April 22, 1968.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

As I indicated in my dissenting opinion in *Ginsberg* v. *New York*, *ante*, p. —, if we assume *arguendo* that the censorship of obscene publications, whether for children or for adults, is in the area of substantive due process, the States have a very wide range indeed for determining what kind of movie, novel, poem, or article is harmful. If that were the test, I would agree with my Brother HARLAN that the standard of "sexual promiscuity" in this Dallas ordinance is sufficiently precise and discriminating for modern man to apply intelligently.

My approach to these problems is, of course, quite different. I reach the result the Court reaches for the reasons stated in my dissenting opinions in *Ginsberg* and other cases and therefore concur in reversing the present judgments.

SUPREME COURT OF THE UNITED STATES

Nos. 47, 56, AND 64.—OCTOBER TERM, 1967.

Sam Ginsberg, Appellant, 47 *v.* State of New York.	On Appeal From the Appellate Term of the Supreme Court of New York, Second Judicial Department.
Interstate Circuit, Inc., Appellant, 56 *v.* City of Dallas.	On Appeals From the Court of Civil Appeals of Texas, Fifth Supreme Judicial District.
United Artists Corporation, Appellant, 64 *v.* City of Dallas.	

[April 22, 1968]

MR. JUSTICE HARLAN, concurring in No. 47, and dissenting in Nos. 56 and 64.

These cases usher the Court into a new phase of the intractable obscenity problem: may a State prevent the dissemination of obscene or other obnoxious material to juveniles upon standards less stringent than those which would govern its distribution to adults?

In No. 47, the *Ginsberg* case, the Court upholds a New York statute applicable only to juveniles which, as construed by the state courts, in effect embodies in diluted form the "adult" obscenity standards established by *Roth* v. *United States*, 354 U. S. 476, and the prevailing opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413. In Nos. 56 and 64, the *Interstate Circuit* cases, the Court strikes down on the ground of vagueness a similar Dallas ordinance, not couched, however, entirely in obscenity terms. In none of these cases does the Court pass judgment on the particular material condemned by the state courts.

As the Court enters this new area of obscenity law it is well to take stock of where we are at present in this constitutional field. The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.[1] Two members of the Court steadfastly maintain that the First and Fourteenth Amendments render society powerless to protect itelf against the dissemination of even the filthiest materials.[2] No other member of the Court, past or present, has ever stated his acceptance of that point of view. But there is among present members of the Court a sharp divergence as to the proper application of the standards in *Roth, supra*,[3] *Memoirs, supra*,[4] *and Ginzburg* v. *United States*, 383

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[1] In the 13 obscenity cases since *Roth* in which a signed opinion was written for the Court, there have been a total of 55 separate opinions among the Justices. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (four opinions); *Roth* v. *United States, supra* (four opinions); *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684 (six opinions); *Smith* v. *California*, 361 U. S. 147 (five opinions); *Times Film Corp.* v. *Chicago*, 365 U. S. 43 (three opinions); *Marcus* v. *Search Warrant*, 367 U. S. 717 (two opinions); *Manual Enterprises* v. *Day*, 370 U. S. 478 (three opinions); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (four opinions); *Jacobellis* v. *Ohio*, 378 U. S. 184 (six opinions); *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (four opinions); *Memoirs* v. *Massachusetts, supra* (five opinions); *Ginzburg* v. *United States*, 383 U. S. 463 (five opinions); *Mishkin* v. *New York*, 383 U. S. 502 (four opinions).

[2] See *Roth* v. *United States, supra*, at 508 (dissenting opinion); *Jacobellis* v. *Ohio, supra*, at 196 (concurring opinion); *Ginzburg* v. *United States, supra*, at 476, 482 (dissenting opinions).

[3] *Roth* stated the test to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S., at 489 (note omitted).

[4] *Memoirs* elaborated the *Roth* test as follows: "it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community

U. S. 463,[5] for judging whether given material is constitutionally protected or unprotected. Most of the present Justices who believe that "obscenity" is not beyond the pale of governmental control seemingly consider that the *Roth-Memoirs-Ginzburg* tests permit suppression of material that falls short of so-called "hard core pornography," on equal terms as between federal and state authority.[6] Another view is that only "hard core pornography" may be suppressed, whether by federal or state authority.[7] And still another view, that of this writer, is that only "hard core pornography" may be suppressed by the Federal Government, whereas under the Fourteenth Amendment States are permitted wider authority to deal with obnoxious matter than might be justifiable under a strict application of the *Roth-Memoirs-Ginzburg* rules.[8]

There are also differences among us as to how our appellate process should work in reviewing obscenity determinations. One view is that we should simply

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standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U. S., at 418.

[5] The *Ginzburg* "test" is difficult to state with any precision. The Court held that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." 383 U. S., at 474. But this "simply elaborates the test by which the obscenity vel non of the material must be judged." *Id.*, at 475. Yet evidence of pandering may "support the determination that the material is obscene even though in other contexts the material would escape such condemnation." *Id.*, at 476. Pandering itself evidently encompasses every form of the " 'business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' " *Id.*, at 467 (note omitted).

[6] See, *e. g.*, *Jacobellis* v. *Ohio*, *supra*, at 193–195.

[7] See *id.*, at 197 (concurring opinion).

[8] See *Roth* v. *United States*, *supra*, at 496 (concurring and dissenting opinion); *Memoirs* v. *Massachusetts*, *supra*, at 455 (dissenting opinion).

examine the proceedings below to ascertain whether the lower federal or state courts have made a genuine effort to apply the *Roth-Memoirs-Ginzburg* tests, and that if such is the case, their determinations that the questioned material is obscene should be accepted, much as would any findings of fact.[9] Another view is that the question of whether particular material is obscene inherently entails a constitutional judgment for which the Court has ultimate responsibility, and hence that it is incumbent upon us to judge for ourselves, *de novo* as it were, the obscenity *vel non* of the challenged matter.[10]

The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment.[11] From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, mostly in state cases, all to no better end than second-guessing state judges. In all except rare instances, I venture

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[9] See *Jacobellis* v. *Ohio*, *supra*, at 202 (dissenting opinion).

[10] See *id.*, at 190; *Roth* v. *United States*, *supra*, at 497–498 (concurring and dissenting opinion); *Kingsley Pictures Corp.* v. *Regents*, *supra*, at 708 (concurring opinion).

[11] See, *e. g.*, *Keney* v. *New York*, 388 U. S. 440; *Friedman* v. *New York*, 388 U. S. 441; *Ratner* v. *California*, 388 U. S. 442; *Cobert* v. *New York*, 388 U. S. 443; *Sheperd* v. *New York*, 388 U. S. 444; *Avansino* v. *New York*, 388 U. S. 446; *Aday* v. *United States*, 388 U. S. 447; *Corinth Publications, Inc.* v. *Wesberry*, 388 U. S. 448; *Books, Inc.* v. *United States*, 388 U. S. 449; *Rosenbloom* v. *Virginia*, 388 U. S. 450; *A Quantity of Copies of Books* v. *Kansas*, 388 U. S. 452; *Mazes* v. *Ohio*, 388 U. S. 453; *Schackman* v. *California*, 388 U. S. 454; *Landau* v. *Fording*, 388 U. S. 456; *Potomac News Co.* v. *United States*, 389 U. S. 47; *Conner* v. *City of Hammond*, 389 U. S. 48; *Central Magazine Sales, Ltd.* v. *United States*, 389 U. S. 50; *Chance* v. *California*, 389 U. S. 89.

to say, no substantial free-speech interest is at stake, given the right of the States to control obscenity.

I believe that no improvement in this chaotic state of affairs is likely to come until it is recognized that this whole problem is primarily one of state concern, and that the Constitution tolerates much wider authority and discretion in the States to control the dissemination of obscene materials than it does in the Federal Government. Reiterating the viewpoint that I have expressed in earlier opinions, I would limit federal control of obscene materials to those which all would recognize as what has been called "hard core pornography," and would withhold the federal judicial hand from interfering with state determinations except in instances where the state action clearly appears to be but the product of prudish over-zealousness. See *Roth* v. *United States, supra,* at 496; *Manual Enterprises* v. *Day,* 370 U. S. 478; *Jacobellis* v. *Ohio, supra,* at 203; *Memoirs* v. *Massachusetts, supra,* at 455. And in the juvenile field I think that the Constitution is still more tolerant of state policy and its applications. If current doctrinaire views as to the reach of the First Amendment into state affairs are thought to stand in the way of such a functional approach, I would revert to basic constitutional concepts that until recent times have been recognized and respected as the fundamental genius of our federal system, namely the acceptance of wide state autonomy in local affairs.

I come now to the cases at hand. In No. 47, *Ginsberg,* I concur in the judgment and join the opinion of the Court, fully preserving, however, the views repeatedly expressed in my earlier opinions in this field.

In Nos. 56 and 64, the *Interstate Circuit* cases, I respectfully dissent. I do not agree that the Dallas ordinance can be struck down, as the Court now holds, on the score of vagueness. The ambiguities about which

the Court expresses concern are essentially two.[12] First, the ordinance does not include a definition of "sexual promiscuity."[13] Second, the ordinance provides that a film "shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity . . . if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted." The Court is concerned that many may disagree as to whether any specific materials create such impressions on young persons.

These seem to me entirely inadequate grounds on which to strike down the ordinance. It must be granted, of course, that people may differ as to the application of these standards; but the central lesson of this Court's efforts in this area is that under all verbal formulae, including even this Court's own definition of obscenity, reasonable men can, and ordinarily do, differ as to the proper assessment of challenged materials. The truth is that the Court has demanded greater precision of language from the City of Dallas than the Court can itself give, or even than can sensibly be expected in this area of the law.

The Court has not always asked so much.[14] In *Roth*, the federal statute under which the petitioner had been

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[12] The Court emphasizes at greater length the failure of the Board and the Texas courts to proffer any clarification of the ordinance. This compels examination of the ordinance's terms, but it does not, of course, offer any independent basis for a conclusion that the ordinance is ambiguous.

[13] The Court acknowledges that the city has since adopted a definition of sexual promiscuity, but it expresses no views as to the definition's adequacy.

[14] It is pertinent to note that a majority of the Court did not hold that the New York statute at issue in *Kingsley Pictures Corp.* v. *Regents*, *supra*, was impermissibly vague. The statute forbade the exhibition of a film "which portrays acts of sexual immor-

sentenced to five years of imprisonment forbade the mailing of material that was "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character." [15] 354 U. S., at 491. In *Alberts*, the companion case to *Roth*, the California statute provided that the materials must have a "tendency to deprave or corrupt its readers." *Id.*, at 498. No definitions were included in either statute, yet the Court there explicitly rejected the argument that they did not "provide reasonably ascertainable standards of guilt . . . ." *Ibid.* The Court recognized that the terms of obscenity statutes are necessarily imprecise, but emphasized, quoting *United States*

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ity . . . or . . . presents such acts as desirable, acceptable or proper patterns of behavior." *Id.*, at 685. It appears that only the concurring opinion of Mr. Justice Clark, upon which the Court now relies so heavily, described this standard as vague. Indeed, Mr. Justice Frankfurter said in his concurring opinion that the "Court does not strike the law down because of vagueness . . . ." *Id.*, at 695. See also *id.*, at 704. Mr. Justice Frankfurter went on to say that "'[s]exual immorality' is not a new phrase in this branch of law and its implications dominate the context. I hardly conceive it possible that the Court would strike down as unconstitutional the federal statute against mailing lewd, obscene and lascivious matter, which has been the law of the land for nearly a hundred years, see the Act of March 3, 1865, 13 Stat. 507, and March 3, 1873, 17 Stat. 599, whatever specific instances may be found not within its allowable prohibition. In sustaining this legislation this Court gave the words 'lewd, obscene and lascivious' concreteness by saying that they concern 'sexual immorality.'" *Id.*, at 695–696.

[15] The statute involved in *Roth* now provides in part that it is a criminal offense to import or transport in interstate commerce any "obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter writing, print, or other matter of indecent character . . . ." 18 U. S. C. § 1462. Similarly, § 1461 provides that it is a criminal offense to mail any "obscene, lewd, lascivious, indecent, filthy or vile" article. See also §§ 1463, 1464, 1465. Although each of these sections makes profuse use of the disjunctive, no definitions of any of these descriptive terms are provided.

v. *Petrillo*, 332 U. S. 1, 7–8, that the " 'Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. . . .' "[16] *Ibid.* Yet it should be repeated that the *Interstate Circuit* cases, unlike *Roth* and *Alberts*, involve merely the classification, not the proscription by criminal prosecution, of objectionable materials. In my opinion, the ordinance does not fail either to give adequate notice of the films that are to be restricted, or to provide sufficiently definite standards for its administration.[17]

Although the Court finds it unnecessary to pass judgment upon the materials involved in these cases, I consider it preferable to face that question. Upon the

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[16] The Court went on to say that it "is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy the due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." 354 U. S., at 492, n. 30. Precisely similar reasoning should be applicable to boards like that created by the Dallas ordinance, although the cost of differences in result is here measured (at least initially) by film classifications, and not by lengthy terms of imprisonment.

[17] It is difficult to see how the Court could suppose that its *Memoirs* formula offers more precise warnings to film makers than does the Dallas ordinance. Surely the Court cannot now believe that "redeeming social value," "patent offensiveness," and "prurient interest" are, particularly as modified so as to apply to children, terms of common understanding and clarity. Moreover, one wonders whether the pandering rationale adopted in *Ginzburg* v. *United States*, *supra*, is thought to give more "guidance to those who seek to adjust their conduct" than does the Dallas ordinance. It is difficult to imagine any standard more vague, or more overbroad, than the "new subjectivity" created by the Court's search for the "leer of the sensualist." See Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7, 61.

premises set forth in my *Roth* and *Memoirs* opinions, and reiterated here, I would hold that in condemning these materials New York and the City of Dallas have acted within constitutional limits.

I would affirm the judgments in all three cases.